SELECTIONS FROM ROMAN LAW

JAMES J. ROBINSON

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SELECTIONS

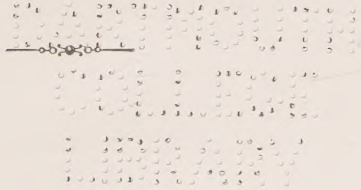
FROM THE

PUBLIC AND PRIVATE LAW OF THE ROMANS

WITH A COMMENTARY TO SERVE AS AN INTRODUCTION TO THE SUBJECT

BY

JAMES J. ROBINSON, PH.D.
FORMERLY INSTRUCTOR IN LATIN, YALE UNIVERSITY



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PREFACE

The purpose of this book is to introduce the student to some of the more interesting and instructive principles of Roman law by selected passages from the original Latin sources. It is intended to offer to students of Latin a selection of texts gathered from a field well worthy of study by those who would broaden their view of Roman life and institutions, as well as by those who would extend their acquaintance with the Latin language beyond the Latinity of the authors usually read in a college course.

It is scarcely necessary to repeat what is acknowledged on all sides — that Rome's legal and political institutions are the imperishable monument to the real genius and civilization of her people, and that they constitute her most important contribution to the modern world.

Furthermore, along with the more recent tendency to broaden the scope of philological studies, it is beginning to be more fully recognized that the language of the Roman legal writers is worthy of greater attention than it has hitherto received. The Roman jurists were as a rule exponents of a concise, clear, and elegant style. At a time when Latin literature had lost its art, and artificiality of thought and diction was substituted for the better tradition, the jurists were still writing with a simplicity and elegance worthy of the importance and dignity of their subject-matter and in keeping with their distinguished

position in public life. The concrete case arising in the everyday, practical affairs of men formed the basis of their abstractions, and their writings, being the record of experience drawn from the life of their own day, contribute to a more complete understanding of the Roman people.

The best texts have been followed, and only an occasional verbal change has been allowed when required to render the text more intelligible. No attempt has been made toward uniformity of spelling of words drawn from so many sources. One linguistic difficulty in legal texts cannot be avoided. From the manner in which they have been preserved and transmitted, it can never be positively determined that we have the exact words of the author excerpted or the linguistic peculiarities of his period. The excerpts (*fragmenta* or *leges*) presented in Justinian's Digest suffered revision at the hands of the jurists compiling that work. The extent to which the idiom and vocabulary of authors already several centuries dead were thereby affected, cannot now be determined.

The classical student should perhaps be reminded that there are no sources giving anything like a general survey of the law as it was in the best days of Rome. No attempt has been made, therefore, in these selections to present the law of any one period, but the historical development of some institutions has been briefly traced in the notes.

Extracts from the legal literature have been freely quoted in the notes, both to explain the text and to encourage the student to acquaint himself still further with the original sources. The technical terms of Roman law commonly occurring in Latin literature and works on Roman history, and many of the concise and pithy maxims characteristic of the Roman legal system, have been put

before the learner with considerable frequency by intentional repetition and by cross reference.

Chief attention has been given to the subject-matter, but an occasional linguistic or grammatical difficulty has been explained or reference has been given to the school grammars in general use, indicated by the usual initials.

In addition to acknowledgments made in the notes, the author's indebtedness to many of the more important works on Roman law is publicly acknowledged by appending at the end of the volume a list of works cited and most frequently consulted.

Grateful acknowledgment is due Professor Eduard Hölder and Professor August von Bechmann, of the universities of Leipzig and Munich respectively, for material drawn from notes taken in their most instructive and learned lectures.

My friend and former colleague, Professor J. W. D. Ingersoll, of Yale University, very courteously read the manuscript and offered valued criticism. I am most deeply indebted to my friend and former colleague, Professor E. P. Morris, for his constant encouragement from the very inception of the idea of publishing some legal selections, and for his careful criticism and help at every stage of the work.

The fact that the author knows no book of similar purpose, and has had to determine and pursue his own course without guide or forerunner, has not only increased his difficulties, but has made it impossible for him to avoid many imperfections.

JAMES J. ROBINSON.

The Hotchkiss School,
Lakeville, Connecticut.

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C. 5, 17, 8.	Justinian's Code, book 5, title 17, constitution 8.
C. Th. 9, 5, 1.	Theodosian Code, book 9, title 5, constitution 1.
Collat. 6, 3, 1.	Comparison of Roman and Mosaic Law, title 6, fragment 3, paragraph 1.
D. 1, 2, 2, pr.	Justinian's Digest, book 1, title 2, fragment 2, *principium* (initial paragraph).
Fr. Vat. 149.	Vatican Fragments, paragraph 149.
Gai. 1, 13.	Institutes of Gaius, book 1, paragraph 13.
Gai. D. 9, 2, 4, 1.	Justinian's Digest, book 9, title 2, fragment (from Gaius) 4, paragraph 1.
Inst. 2, 5, 3.	Justinian's Institutes, book 2, title 5, paragraph 3.
Nov. 118, 3, 1.	Justinian's Novellae, number 118, chapter 3, paragraph 1.
Paul. 2, 20, 1.	Sententiae of Paulus, book 2, title 20, paragraph 1.
Paul. D. 1, 3, 36.	Justinian's Digest, book 1, title 3, fragment (from Paulus) 36.
Ulp. 1, 24.	Fragments of Ulpian, title 1, paragraph 24.
Ulp. D. 3, 3, 1.	Justinian's Digest, book 3, title 3, fragment or *lex* (from Ulpian) 1.

INTRODUCTION

THE SOURCES OF ROMAN PRIVATE LAW

1. Customary Law. — Of all the peoples of antiquity, the Romans displayed the greatest political and legal genius. Organization of government and formulation of legal rights were problems to which they devoted their best thought and abilities. Rome's most enduring monument, therefore, and her greatest contribution to the modern world is her jurisprudence.

Unlike most peoples of antiquity, the Romans regarded their law as springing from a human source. Their constitution was a slow and gradual growth, the work of many men through many years, and the fundamental principle of the constitution was that the people were the source of law. As time went on, however, several agencies came into being which were instrumental in creating and developing the Roman legal system, as will appear from a historical survey of the sources of the private law.

The Romans, like other primitive peoples, lived for centuries governed by no rules of civil conduct save those growing out of custom (*mos*, *mores*, *consuetudo*). Principles of customary law, growing out of the life and experiences of the community, lived on after conscious legislation by the organs of the sovereign power began. The Romans looked upon custom as a source of law, though inferior in quality to statute law, which met more clearly their idea of precision and definiteness of form. After the Roman

people began to express their will in direct legislation, customary law continued to have validity as subsidiary law when not expressly abrogated by statute.

2. **Statute Law.** — A resolution enacted by the entire people (Populus Romanus) in assembly was called *lex*. A *plebiscitum* was a resolution enacted by the plebeians alone in their assembly. Originally *plebiscita* were binding on the plebeians only, but by the Hortensian law (about 287 B.C.), after the conflicts between patricians and plebeians had ended, they were binding on all citizens. Thereafter *lex* and *plebiscitum* were used without distinction of meaning, a *plebiscitum* being often designated as a *lex*.

3. **Leges Regiae.** — According to the tradition handed down in the sources, laws were enacted by the people as early as the Regal period. These so-called *leges regiae* were collected and published by the first Pontifex Maximus, named C. Papirius.

The first authentic mention of these laws dates from the time of Julius Caesar (*ius Papirianum*). These laws were ascribed to individual kings, mostly to the first three, and though they are undoubtedly of great antiquity, their subject-matter shows that they are not *leges* properly, but belong rather to the sacred law, being ordinances of the pontifical college.

The ascription of these so-called laws to individual kings is doubtless apocryphal, as is, perhaps, the account of the kings themselves, and in the absence of the true explanation of their origin, later writers sought to endow them with greater antiquity and sanctity by connecting them with the names of the earliest kings.

4. **The Twelve Tables.** According to the tradition, the Decemviri published the private law and certain provisions

of the public law about sixty years after the beginning of the republic, on twelve tables. These tables remained thereafter the basis of Roman law, and were not formally repealed until the time of the publication of Justinian's law books.

The codification of the law by the Decemviri was politically, the tradition says, the result of a compromise between the patricians and the plebeians, whereby the plebeians were to receive protection against patrician misrule. Though the contents of the extant fragments do not support this view, it does appear that the severity of the previous customary law was somewhat mitigated in favor of the non-ruling classes.

The sources abound in reference to the Greek influence on the law of the Twelve Tables, but with such widely differing opinions that the whole question has been looked upon with suspicion. Some ancient authors would refer the entire Roman code to a Greek source, while others claim only a partial incorporation of foreign law. There are undoubtedly traces of Greek influence in the decemviral legislation, but the sweeping assignment of the Roman code to a Greek origin is only one of the general inventions of early Roman history. The whole idea of the Decemvirate as an irresponsible magistracy, with extraordinary powers to administer the government, codify the law, and supersede constituted authority, is doubtless an invention closely modeled after a Greek original.

It is impossible to separate the real from the fictitious in the transmitted accounts, but the prevailing modern opinion is that the law of the Twelve Tables was, in all of its more important provisions, of a national character, being the native customary law which the Decemviri codified and

published after the proper ratification by the Comitia Centuriata.

The Twelve Tables are, therefore, a statute and are often designated by the Romans as Lex, simply, *i.e.* as their most important *lex*.

It is commonly supposed that the original *tabulae* perished in the destruction of Rome by the Gauls, 390 B.C. They were probably reconstructed and were well known in the days of Cicero, who intimates that schoolboys in his day learned them by heart. Literary traces of them appear as late as the fifth century of our era.

The extant fragments of these laws have been transmitted, partly in the original phraseology, partly in substance only, and chiefly by non-juristic writers.

After the Twelve Tables, statutes continued to be enacted; but after the time of the Punic wars, direct legislation by popular assemblies, at no time a very fruitful source of law, grew gradually less. After codification followed a period of interpretation. New agencies were employed in the further development of the private law. In the early empire, the activity of the popular assembly ceased, and by the changes in the constitution whereby the power was divided between the emperor and the senate, the making of new *leges* and *plebiscita* eventually ceased. The last *lex* which the sources show was enacted under the Emperor Nerva.

5. **Edicts of the Magistrates.** — By the Roman constitution, every magistrate was empowered to issue proclamations concerning the business of his own office and, when these were made in writing and displayed in a public place, they were called *edicta*.

Edicta might be issued for a single case, with only tem-

porary force (*edicta repentina*), or they might contain measures which continued in force during the magistrate's entire term of office (*edicta perpetua*).

In the year 367 B.C. the administration of justice was intrusted to a newly created magistracy called the praetorship. The praetor had the general supervision of the Roman judicial system, and was at the same time judge and minister of justice. About the year 242 B.C. a second praetor was installed, whose duty it was to sit in judgment in cases in which one or both parties were *peregrini*. He was, therefore, at a later time called Praetor Peregrinus; the other praetor whose judicial duties were *inter cives*, having already been designated Praetor Urbanus. It was the duty of the praetors to make use of their *ius edicendi* to set forth the main principles of law and procedure as they were to be administered during their term of office. The praetor's edict was exposed in a public place, on a white board (*album*), at the beginning of his term of service. The only other magisterial edicts of legal importance were those of the curule aediles (*edictum aedilicium*) and the provincial governors (*edicta provincialia*). Of these, the former were occupied chiefly with matters pertaining to the markets, and the latter with the business of provincial administration.

Each magistrate had individual freedom as to the contents of his own edict. It became customary, however, for each succeeding officer to adopt, so far as practicable, the greater part of his predecessor's edict, introducing only emendations and improvement in form or substance. It resulted, therefore, that the fundamental parts of the edict were handed down unchanged (*edictum tralaticium*), while, at the same time, the edict was the instrument wherein

could be incorporated any desirable innovations, such as, for example, the granting of a new remedy or the admission of a new form of plea. It was for this reason that the Roman jurists called the praetor's edict the *viva vox iuris civilis*.

The praetorian edict rose to great importance in the development of the law. The bulk of praetorian law (*ius honorarium*) was developed during the republican period. After the establishment of the empire, the praetor's function as minister of law was absorbed by the emperor himself, and the praetorian edict passed into a stereotyped form. Hadrian commissioned the great jurist, Salvius Julianus, to revise the edicts of the praetor urbanus, the praetor peregrinus, and the curule aedile, consolidating them into a system of praetorian law (*edictum Iulianum*).

The law as set forth in the edict was called magisterial law (*ius honorarium*, *ius praetorium*, *ius aedilicium*) and was sharply distinguished from statute and customary law (*ius civile*). The praetor developed legal principles through his control of procedure, rather than by the direct creation of law, since he was engaged chiefly with the admission of pleas, with remedies, and with the granting or refusal of actions based on equitable considerations. Praetorian law and the *ius civile* continued to exist side by side until the time of Diocletian. Thereafter they were blended for the most part into one system, though traces of their different origin still appeared in the law of Justinian.

6. **Decrees of the Senate.** — During the early history of Rome the senate was not a law-making body, but its influence on legislation was felt through the *auctoritas patrum*, the senate being the advisory council of the executive.

Toward the end of the republic, decrees of the senate seem to have had the force of law to a limited extent. What had been originally received as advice came now to be regarded as a command. In the empire, however, the senate acquired full powers of a legislative body. During the first century of the empire the constitutional right of the senate to make law was still questioned, but as the popular enactment of the comitia gradually disappeared, the decrees of the senate attained greater prominence.

7. **Constitutions of the Emperor.** — All manifestations of the emperor's will which concerned the development of law were called imperial constitutions (*placita* or *constitutiones principum*). From the beginning of the empire, the decrees emanating from the emperor were of great legal significance. After the second century, all ordinances of this kind were called by the general collective name, constitutions of the emperor.

Of these there were four kinds: —

(1) *Edicta.* The emperor, like other magistrates, had the general power of issuing proclamations (*ius edicendi*). His *edicta* were public ordinances of a general character, containing provisions for future observance.

(2) *Decreta.* As the word indicates (*cernere*), the *decreta* were decisions of a judicial character. The emperor, as the chief magistrate, could review the decisions of all cases, as well as decide them in the first instance.

(3) *Epistulae.* These embraced all expressions of the imperial will in epistolary form. When the *epistulae* were replies to questions of officials or private persons regarding points of law, they were frequently called *rescripta*. These answers were sometimes in the form of special letters and sometimes merely added as footnotes (*subscriptiones*) in the

letter of inquiry and returned to the sender. Rescripts were most frequent in private suits, where the emperor, upon request, decided doubtful points of law, leaving the questions of fact to the judge, who was absolutely bound by the interpretation of the emperor. Before the time of Hadrian, rescripts were apparently addressed to judicial magistrates only, thereafter to private persons as well.

(4) *Mandata.* Magistrates, even during the republic, had the power to delegate (*mandare*) authority to subordinates to execute certain business of their office. The emperors availed themselves of this privilege to a high degree and through general instructions (*mandata*) issued to provincial governors and other officials directed them as regards the conduct of their respective offices. These directions were usually in writing, and in this way they obtained significance as sources of law.

Through these various ways in which the emperor manifested his will, it came about that by the time of Diocletian, the jurists ascribed to the emperor's will the force of law (*quod principi placuit, legis habet vigorem*), though without any constitutional authority to that effect.

8. **Scientific Jurisprudence.** — At Rome, in the earliest time, the pontiffs were the depositaries and custodians of law, human (*ius*) and divine (*fas*). They alone were acquainted with the formulae and ritual requisite for the worship of the gods, as well as the procedure and traditions governing the legal relations of men with one another. It was, therefore, the pontiffs who were the earliest counselors in matters of law, imparting their advice (*respondere*) to consulting litigants as to the secret and intricate method of procedure by which their rights could be brought to the test. In matters of state importance, the decisions of the

pontifical college were communicated through the Pontifex Maximus. Opinions on questions of private law were delivered by a member of the college annually detailed for that duty.

The *responsa* of the pontifical college were recorded (*commentarii pontificum*), and the formulated rules of procedure were preserved in the archives of the priestly college (*libri pontificum*). Since pontiffs only had access to these hidden mysteries, early procedure was veiled in secrecy, and, being unknown to laymen and the unprivileged classes, became a great source of power and oppression in the hands of the ruling patrician order.

The pontiffs, as the sole interpreters of the law, were instrumental in giving it shape and form so long as it existed chiefly in the form of unwritten, customary law.

When the law had been given a definite form and had been made known to all by the codification of the Twelve Tables, *ius* and *fas* began to be more definitely separated, but procedure (*actiones, ius actionum*) still remained in the private control of the pontifical college. It was the pontiffs who still retained the technical knowledge whereby the machinery of the law could be set in motion for the vindication of invaded rights.

According to the traditional account, Appius Claudius Caecus made a collection of the formulae of actions as they had been put in shape by the pontiffs, and through the agency of his scribe (Flavius) they were made public (*ius Flavianum*). By this publication the monopoly of the patrician pontiffs was broken. Soon thereafter, the first plebeian pontifex maximus, Tiberius Coruncanius (about 264 B.C.), announced himself as ready to give advice publicly regarding the mysteries of the law (*primus publice*

profiteri coepit), not only to those interested as party in a particular case, but also to those seeking a theoretical knowledge of law. This was the beginning of a system of public legal instruction which led soon to the preparation of text-books and eventually to a legal literature.

The opportunity was thus open for the development of a trained legal profession. Jurists now gave advice in the technicalities of juristic transactions and the drawing of formulae (*cavere*), the method of court procedure (*agere*), and they rendered opinions on legal questions submitted to them (*respondere*). Opinions given in writing (*responsa*), though they were not binding, had a strong moral influence on the court, when they were renderd by able and learned jurists. Controversies and opposing views were the inevitable result of these *responsa*, leading to a lively discussion of principles, which gave a strong impetus to the progress of a legal science (*disputatio fori*).

By this professional activity, new spirit began to be infused into the letter of the law. Scientific interpretation extended the principles of the *ius civile*, making them comprehensive and flexible. In addition to this new application of principles already existing in the *ius civile*, the jurists took up new principles from the *ius gentium*, giving to the strict Roman law a more equitable and universal character.

It was under the emperors that the influence of the jurists reached its highest point. Augustus, in his political reorganization of the state, recognized the expediency of enlisting the services and influence of the professional jurists to the support of his cause. He therefore conferred upon certain eminent jurists the privilege of delivering opinions (*ius respondendi*) which had the force of law, by

authority of the imperial grant (*ex auctoritate principis*). Those jurists having the *ius respondendi* were called *iuris auctores*. The emperor as supreme judge could delegate his power of judicial interpretation to others, whose decisions, by his commission, were authoritative.

At first only the *responsum* given in writing, under seal and for the special case, was binding on the judge; though it soon happened that the writings of these privileged jurists came also to have the authority of their *responsa*. Hadrian ordained that the judge should be bound by concurrent *responsa*, but that, when they were divergent, he should decide according to his own discretion.

9. **The Literature of the Classical Roman Law.** — The scientific cultivation of law led to an enormous literary productiveness. As early as 100 B.C. scientific treatment of subjects began, but the classical period of legal literature fell in a time when other forms of Latin literature were rapidly declining or had entirely lost their art. Roughly the years between 150 and 250 A.D. cover the classical period of Roman jurisprudence. Here belong the names of Gaius, Papinian, Ulpian, Paulus, in whose work the highest degree of excellence known to the Roman law was attained. The scientific legal literature of Roman jurists embraced works of most varied kind and character, of which some of the more important types were the following: —

(1) Commentaries (*a*) on statute law, decrees of the senate, and imperial constitutions, (*b*) on the praetorian edicts, (*c*) on the works of other jurists.

(2) Digests and compilations of a comprehensive character, covering the entire legal system.

(3) Practical discussions of *responsa* and *quaestiones*. Of these, the exposition of the *quaestiones* was the more

detailed, inquiring more minutely into the underlying principles of the cases handled. *Disputationes* and *opiniones* were discussions of a similar character.

(4) *Institutiones* or elementary text-books for beginners.

(5) Annotated editions of earlier jurists' works, containing emendations and critical comments (*notae*).

(6) Monographs on various subjects of legal significance.

(7) *Regulae, sententiae, definitiones*, designed especially for practitioners, containing brief collections of current legal maxims and succinct statements of the more common legal principles.

(8) Popular treatises, containing elementary principles of law, set forth in an informal way.

This classification does not by any means include all the forms which the intellectual output of the jurists exhibited. It is possible to gain some idea of the literary activity of the great jurists and the enormous proportions to which legal literature attained, from the titles of works and the number of volumes of each, as they have been transmitted in the sources.

Taking as examples a few of the greatest jurists, it appears that Papinian's chief works, *Responsa* and *Quaestiones* were in 19 and 37 books respectively, and in addition to these he was the author of several books of different kinds; Paulus wrote one commentary on the praetorian edict in 78 books, *Responsa* in 23 books, *Quaestiones* in 25 books, and, in addition to these, a long list of works making a total of 89 known by title, falling into 319 books; Ulpian's commentary on the praetorian edict contained 81 books, his work *Ad Sabinum* (commentary on the *ius civile* according to the system of Sabinus) 51 books,

and in addition to these enormous works, numerous others, varying in size from one to several books each. Labeo, the great jurist who was contemporary with Augustus, is said to have been the author of 400 legal works.

Of the mass of legal literature which was composed before the time of Diocletian, only a small fragment is extant.

10. Sources of Law after Diocletian. From the time of Diocletian the emperor was the only organ of sovereign power, an absolute monarch, bound by no law. This change in the constitution naturally had its influence on the further development of the law. Already the jurists had proclaimed that the will of the emperor was law, but now and henceforth there was but one source of law and one interpreter of law. The *ius respondendi* of privileged jurists was a thing of the past. Henceforth authoritative *responsa* emanated from the emperor himself and from him alone. The further progress of a scientific legal literature was interrupted. Science died, to be only slightly revived toward the end of the fifth century, through the influence of the law schools.

The *constitutiones principum* were now the only source of new law.

11. Pre-Justinian Codes and Collections of Law. — The literature of law and the constitutions issued by the emperors had become so voluminous that the practitioner was unable to find his way through the mass of interpretation and decision. The inconvenience of working with such an unwieldy bulk of juristic material induced private persons to undertake its abridgment and codification. Several works of this character came into existence.

(1) *Codex Gregorianus*, a private code of imperial constitutions, which were issued from the time of Hadrian to

295 A.D., containing at least nineteen books. This code was published about 300 A.D.

(2) *Codex Hermogenianus*, also a private work composed of imperial ordinances. This work was published as a supplement to the foregoing code, and appeared about the year 365 A.D.

(3) *Fragmenta Vaticana*, so-called because discovered in the Vatican library. This collection, containing juristic writings and imperial ordinances, was the work of an unknown author. It was a private publication, composed between 372 and 438 A.D.

(4) *Collatio legum Mosaicarum et Romanarum* or *Lex Dei quam Dominus praecepit ad Moysen*, a parallel of verses from the Pentateuch and passages from several Roman jurists, the Gregorian and Hermogenian codes, and one or two later ordinances. The work was published between 390 and 438 A.D. by an unknown author.

(5) *Codex Theodosianus*, a codification of juristic literature and imperial constitutions issued after Constantine's time, prepared by order of the Emperor Theodosius II. The work was published 438 A.D., considerable portions of it still surviving.

(6) *Consultatio veteris cuiusdam iuris consulti*, a collection of opinions delivered by a jurist to an advocate, with citations from Paulus and the three codes mentioned above.

12. **Legislation of Justinian.** — Justinian succeeded to the throne April 1, 527, and continued to reign until his death, November 13, 565. From the very beginning of his rule he pursued a well-defined plan for the codification of the Roman law. For the execution of his legal reforms he enlisted the services of his minister, Tribonian, whose

ability and zeal were of the greatest value toward the successful accomplishment of the undertaking.

The history of the preparation of the compilation of Justinian's law books is given in detail in the decrees placed as a preface to the different parts of the work. Many of the facts there stated have been lately called into question, and they should be taken with due allowance for the bombastic and exaggerated style of an Oriental monarch.

What is commonly called the Code of Justinian consists of four parts, as it exists in modern times.

(1) The *Pandects*, or *Digest*, of the scientific law literature; (2) the *Codex*, or collection of imperial laws; (3) the *Institutiones*, or introductory text-book for instruction; (4) the *Novellae*, or new imperial laws issued after the other works were completed.

13. **The Code.** — By royal decree, a committee of ten men was instructed to prepare a collection of laws, compiled from the three codes and the imperial constitutions issued later than the Theodosian code, together with the constitutions already issued by Justinian, and to publish them in a code suitable for the use of practitioners. This work was completed and published with the force of law, April 16, 529. All imperial legislation not contained in this code was to be discarded. This work was called the *Codex Iustinianus*.

14. **The Fifty Decisions.** — After the publication of the Codex, Justinian attempted by a number of constitutions to remove misconceptions and conflicts growing out of the juristic literature, and to set aside or alter provisions of the law which had become dead or worthless. These were published as a collection in 531 A.D., and were known as

the *Quinquaginta Decisiones*. These have not survived to the modern world.

15. **The Pandects or Digest.** — The foregoing tasks were only preliminary to a much greater undertaking, — the codification of the scientific law literature. For the execution of this work, a new commission of seventeen members, under the leadership of Tribonian, was appointed December 15, 530.

From the huge mass of legal literature the most essential material was to be extracted, systematized, and arranged in one harmonious whole. This undertaking was completed and published with force of law December 30, 533, bearing the title *Pandectae* (πάν + δέχεσθαι), or *Digesta* (*digerere*).

The work was divided into fifty books, each book falling into titles (*tituli*), and each title having its appropriate heading (*rubrica*, "written in red"). Under the titles stand the excerpts, called *fragmenta* or *leges* (*fr.* or *l.*), each one being preceded by the name of the author and the name of the work excerpted. Each fragment or lex is divided into a *principium* (*pr.*) and numbered paragraphs.

The earliest of the jurists whose writings are represented in the Digest is Q. Mucius Scaevola, consul 95 B.C.; the most recent were Charisius and Hermogenianus (about 300 A.D.).

Although thirty-nine jurists in all are represented in the excerpts of the Digest, the great bulk of the material was drawn from very few authors. Ulpian and Paulus together contribute about three fifths of the entire Digest. Of this amount, Ulpian alone furnishes about two fifths. The rest of the material of the Digest is drawn chiefly from about eight writers. Arranged according to the amount of mat-

ter contributed, the excerpted authors stand approximately as follows: Ulpian, Paulus, Papinian, Gaius, Modestinus, Cervidius Scaevola, Pomponius, Julianus, and (*proximi longo intervallo*) Marcianus, Javolenus, Africanus, Marcellus; these twelve furnished about eleven twelfths of the whole compilation.

It was decreed that the Digest should henceforth be the sole authority for jurist-made law, and that only the excerpts incorporated in this work should have validity.

The commission had full authority to curtail, alter, or supplement the original text to bring the subject-matter into harmony with their times. Inasmuch as this freedom was extensively employed, it is not always certain that the text is that of the original excerpted author (*Interpolationes, Emblemata Triboniani*).

16. The Institutes. — As a part of the general plan of his legal reforms, Justinian recognized the importance of an elementary work to serve as an introduction to the study of the Digest, and intended as a book of instruction (*instituere*) for beginners in the study of law.

This work was prepared by two law professors, under the general supervision of Tribonian, and was published with the force of law along with the Digest, December 30, 533, bearing the title, *Institutiones*.

The subject-matter was drawn largely from the Institutes and Res Cottidianae of Gaius, from similar works of Ulpian, and from the Institutes of Florentinus and Marcianus, compiled and arranged in such a way as to present a continuous treatment of the entire legal system.

17. The New Code. — So much new law had been created through the ordinances of Justinian since the publication of the Codex in 529, that a revision of that work

was already required. This undertaking was intrusted to a commission under the leadership of Tribonian, and the work was ready for publication with the force of law December 29, 534.

The revised Codex (*Codex repetitae praelectionis*) contained, besides the revision of the constitutions of the previous Codex, the imperial ordinances issued since 529. All constitutions not included in it were to be discarded as invalid. It is this work, chiefly taken up with matters of public law, which is known in modern times as the Code.

The Codex is divided into twelve books, each book being subdivided into titles, and the titles into *leges* and paragraphs.

With the revision of the Codex, the three works intended by Justinian to constitute one single code of law were completed. The *Corpus Iuris* of Justinian was composed of (1) the Digest, (2) the Institutes, and (3) the Code.

18. **The Novellae.** — After the *Corpus Iuris* had been published with statutory force, Justinian continued to issue constitutions to supplement and correct his previous works. These were issued in large numbers between the years 535 and 565 A.D. They were mostly in Greek, some in both Greek and Latin, and a few in Latin only. These were collected and published after Justinian's death with the title, *Novellae* (i.e. *novellae constitutiones post codicem*).

The collection of Institutes, Digest, Codex, and Novels constitutes the *Corpus Iuris Civilis* in the form in which it is known in modern times. It is in this form that the Roman law has been, for the most part, preserved and received by continental Europe.

19. **The Roman Barbarian Codes.** — Though not properly reckoned among the sources of Roman law, it is neces-

sary to notice the three Codes which some of the barbarian kings promulgated for the Roman inhabitants of their respective kingdoms, and which were drawn from Roman sources. These codes, or summaries, are sometimes called *Leges Romanae Regum Barbarorum*, and, although they do not contain Roman law in an uncontaminated form, they are, in a varying degree, of importance for the understanding of the law prior to Justinian and the history of the text of certain sources outlined below, since they have preserved some material which would otherwise have been lost.

(*a*) *Lex Romana Visigothorum*, called also *Breviarium Alaricianum*, a code published by King Alaric II in 506 for the Roman subjects of the Visigothic kingdom. It contained excerpts from the Institutes of Gaius, the Sententiae of Paulus, the Codex Gregorianus, the Codex Hermogenianus, the Codex Theodosianus, the post-Theodosian Novellae, and a Responsum of Papinian. The Institutes of Gaius were incorporated in this Code in an abridgment, which had been made for the purposes of instruction, and the first knowledge of the work was gained from this source. It furnished also the text of the Sententiae of Paulus (see below, § 22, *c*). Edition, Hänel, *Lex Romana Visigothorum*, Leipzig, 1849.

(*b*) *Edictum Theodorici*, or the *Lex Romana Ostrogothorum*, a code published by Theodoric the Great for his Roman and Ostrogothic subjects, soon after 512. It contained an independent presentation of law drawn from the Codex Gregorianus, the Codex Hermogenianus, the Codex Theodosianus, the post-Theodosian Novellae, the Sententiae of Paulus, and other sources of Roman law. Edition, Bluhme, *Monumenta Germaniae Leges*, V, pp. 145 ff. Hannover, 1875.

(*c*) *Lex Romana Burgundionum*, a code published by the king of the Burgundians for the Roman subjects of the Burgundian kingdom sometime about 512. It contained, in an independent form, law taken from Roman sources worked over with Burgundian elements into the form of a code. The Roman sources drawn upon were the Codex Gregorianus, the Codex Hermogenianus, the Codex Theodosianus, the post-Theodosian Novellae, the Institutes of Gaius, and the Sententiae of Paulus. Edition, Bluhme, *Monumenta Germaniae Leges*, III, pp. 579 ff. Hannover, 1863.

SOURCES OF INFORMATION FOR THE STUDY OF ROMAN LAW

The preceding paragraphs have traced briefly the sources from which the Roman law originated, and the agencies by which it was expanded and reduced to a system. There have been noticed also the attempts to bring the great mass of law into a more available form, by collections and codes, and finally the great achievement of the Emperor Justinian in reducing the law to the form in which it was handed down to the modern world.

It now remains to mention briefly the sources extant and available at the present day for the study of Roman law, and also to indicate some of the books in which these sources may be most conveniently found.

20. **The Extant Sources of Roman Law in their Original Form.** — The material extant in original form falls into two groups: the *Corpus Iuris Civilis* and the pre-Justinian sources, which have been transmitted in various ways.

The account of the origin and general character of the

several parts of the *Corpus Iuris* has been given above (§§ 12 ff.). The most authoritative edition is that of Mommsen, Krüger and Schöll (*editio stereotypa*). It is published in three volumes, of which Vol. I contains the Institutes and the Digest, 7th ed., Berlin, 1895; Vol. II contains the Codex, 6th ed., Berlin, 1895; and Vol. III contains the Novellae, 1st ed. begun in 1880 and completed in 1895. Of this monumental work, the Digest was edited by Theodor Mommsen, the Institutes and Codex by Paul Krüger, and the Novellae by Rudolf Schöll (completed after his death by Wilhelm Kroll). There is no ancient, single Ms. of the entire *Corpus Iuris*. The edition of D. Gothofredus, 1583, was the first to print the whole body of the law of Justinian as a single book with the title *Corpus Iuris Civilis*. The editions are very numerous, and it has been said that no other book, except the Holy Bible, has been printed so often.

Of the Institutes, the best separate text editions are those of Krüger, Berlin, 1900 (the latest and most critical), and Huschke, Leipzig, 1878, in the Teubner series. Some other editions, with notes or commentary, are: J. B. Moyle, *Imperatoris Iustiniani Institutionum Libri Quattuor*, Vol. I, text, introduction, notes, and various excursuses; Vol. II, English translation, Oxford, 3d ed., 1896; T. C. Sandars, *The Institutes of Justinian*, with introduction, text, translation, and notes, containing at the end a summary of the principal contents of the text and notes, arranged in a methodical form, 8th ed., London and New York, 1888; J. Ortolan, *Explication Historique des Instituts de l'Empereur Justinien, avec le texte, la traduction en regard et les commentaires sous chaque paragraphe*, 2 vols., 12th ed., Paris, 1883; E. Schrader, *Corpus Iuris Civilis*,

Vol. I, containing the Institutes, with valuable commentary, Berlin, 1832.

21. The Pre-Justinian Sources. — These sources are of several kinds, transmitted in different ways. The more important are: the writings of jurists in their original form; the remains of collections and codes in their original form; the constitutions of the emperors in their original form; the statutes and popular enactments in their original form; other documents and records of legal transactions written on various materials; and the information supplied by lay writers in the literature of Rome. These various sources will be noticed in the order indicated.

22. The Writings of Jurists. — The bulk of the extant literature of the first three centuries of the Empire (the so-called classical period) has been transmitted through the Digest of Justinian. Excerpts from some of the greatest jurists of this period have been preserved in the remains of the collections noticed above (§ 11); but there are several more or less fragmentary works, or parts of works, of jurists which have been transmitted in some cases directly and in their original form, in other cases indirectly and in an altered text. The more important of these are noticed below, and first, those emanating from the classical period: —

(*a*) *Gaii institutionum commentarii quattuor*, discovered by Niebuhr, in 1816, at Verona, in a palimpsest of about the fifth century. This work is by far the most complete and important of these sources. It was before this known only from an abridgment of it (*epitome Gaii*) contained in the *Lex Romana Visigothorum*. The Institutes of Gaius were a model for the compilers of the Institutes of Justinian. Large portions of Gaius were taken over bodily

into the later work, often with mere verbal alterations. Facts regarding the origin, personal history, and even the name of the author of this work, commonly called "Gaius," are unknown. The purpose of the book is not definitely known. It was possibly intended as an elementary text-book for the use of students beginning their studies in the law school. It was composed about 161 A.D., and it gives, in a simple and clear style, a systematic presentation of the law of that period. The first edition was prepared by Göschen, under commission from the Prussian Academy of Sciences in 1820. The most critical reproduction of the Ms. has been published by W. Studemund, with the title *Gaii institutionum commentarii quattuor. Codicis Veronensis denuo collati apographum*, Leipzig, 1874. Corrections and additions, derived from subsequent examinations of the Ms., have been incorporated in the latest and most critical text edition, that of Krüger and Studemund, 4th ed., Berlin, 1899 (Vol. I of the *Collectio*, see below, § 29). The Teubner text of Huschke is far less authoritative. An excellent English edition is that of E. Poste, *Gaii Institutionum Iuris Civilis Commentarii Quattuor*, with translation and commentary, Oxford, 3d ed., 1890.

(*b*) *Vlpiani liber singularis regularum*, usually called the Fragments of Ulpian, discovered by Jean Dutillet in 1540, in a Ms. of the tenth century, then in his own possession, now in the Vatican. About one third of the book is missing at the end. Its style is characterized by an admirable brevity, clearness, and precision in the treatment of the most fundamental doctrines of the private law. The fragment forms part of Vol. II of the *Collectio*, see below.

(*c*) *Pauli libri quinque sententiarum ad filium*, usually called the Sententiae of Paulus. This work was contained

in the *Lex Romana Visigothorum* (see above, § 19, *a*) and, owing to its indirect transmission, is in a less genuine and uncontaminated form than the Fragments of Ulpian. The omissions have been partly supplied by passages found in other extant sources, *e.g.* the Digest, the *Collatio*, and the *Fragmenta Vaticana*. The book contains a survey of the most important principles of the private law, briefly stated and intended for practical use. It forms part of Vol. II of the *Collectio*.

(*a*) Several minor fragments, giving information on single subjects or points, rather than any connected survey of the law, have been transmitted. The following are some of the more noteworthy: (1) *Notae iuris*, of the grammarian Valerius Probus (lived in the latter half of the first century), containing an explanation of abbreviations employed in statutes, edicts, decrees of the senate, etc., *e.g.* V.D.P.R.L.P., that is, *unde de plano recte legi possit* (see note on *latam*, p. 46). The authoritative recension is that of Mommsen in Keil's *Grammatici Latini*, IV, pp. 265 f., given by Krüger in Vol. II, pp. 141 f. of the *Collectio*. (2) *Fragmentum de iure fisci*, discovered by Niebuhr in Verona simultaneously with the Ms. of Gaius. Its authorship is uncertain. The fragment is found in the *Collectio*, Vol. II, p. 162. (3) *Fragmentum Dositheanum de Manumissionibus*, a part of a schoolbook of the year 207 A.D. The master, Dositheus, set before his Greek-speaking pupils, as an exercise in translation, a passage from some Roman jurist. The text is in the form of a retranslation from Greek back into Latin, with the crudities of schoolboy exercises in translation. Found in the *Collectio*, Vol. II, p. 149. (4) *Fragmentum de formula Fabiana*, a parchment fragment discovered in Egypt and first published

in 1888. In it occurs the *formula Fabiana*, but the work, of which the fragment formed a part, and its authorship are unknown. Found in the *Collectio*, Vol. III, p. 299. (5) *Papiniani responsorum fragmenta*, badly mutilated fragments of the fifth and ninth books of Papinian's Responsa, recovered from an Egyptian parchment in 1876. Found in the *Collectio*, Vol. III, p. 285.

23. Pre-Justinian Sources of the Post-classical Period. — Of these sources, some proceeded from the Western, and some from the Eastern, Roman Empire. Of the former are: —

(*a*) *Fragmenta Vaticana*, discovered by Cardinal Mai in 1821, in a palimpsest of the Vatican library, containing somewhat extensive remains of a large collection of excerpts from juristic writings and imperial constitutions (see § 11 above). Found in the *Collectio*, Vol. III, p. 1.

(*b*) *Collatio legum Mosaicarum et Romanarum*, containing excerpts from Gaius, Papinian, Paulus, Ulpian, Modestinus, and constitutions from the Gregorian and Hermogenian codes. The purpose of the author in making this parallel comparison of the Roman and Mosaic law is variously explained, but it was probably done merely to show the many points of identity in the two systems. Found in the *Collectio*, Vol. III, p. 107 (see § 11 above).

(*c*) *Consultatio*, etc. (see § 11 above), a fragment of a collection of opinions on questions of law, dating from the end of the fifth or the beginning of the sixth century. The work probably originated in Gaul, where the single Ms. was discovered. Found in the *Collectio*, Vol. III, p. 199. From the Eastern Empire are: —

(*d*) *Scholia Sinaitica*, papyrus fragments discovered on Mt. Sinai, containing scholia on Ulpian's *Libri ad Sabi-*

num, written between 439 and 529. Found in the *Collectio*, Vol. III, p. 265.

(*e*) *Leges Constantini, Theodosii, et Leonis*, or a collection of Syrio-Roman law, found in Mss. in the Syrian, Arabic, and other Oriental languages, probably made from one Greek original, and dating from the years between 472 and 529. As an exposition of Roman law it is of little value. The authoritative edition, with translation and commentary, is by Bruns and Sachau, with the title, *Das Syrisch-Römische Rechtsbuch*, Leipzig, 1880.

24. Extant Remains of Pre-Justinian Constitutions. — The imperial constitutions, known either in their original phraseology, through independent transmission, or, in subject-matter, through their preservation in other sources, are numbered by the thousands. These cannot be mentioned here in detail. Some have been preserved by inscriptions, others by their interpretation and elaboration in the writings of jurists and lay writers, still others in the remains of codes and collections. A collection of pre-Justinian constitutions is that of Hänel, *Corpus Legum ab Imperatoribus Romanis ante Iustinianum Latarum*, Leipzig, 1857. Information regarding the Gregorian and Hermogenian codes is derived from the use made of them by later works, *e.g. Lex Romana Visigothorum*, *Collatio*, *Consultatio*, etc. For these codes the best edition of the remains is that of Krüger, *Collectio*, Vol. III, p. 221. For the Theodosian Code, there is no good Ms., but frequent gaps have been filled from later works, which drew from that source. The best edition is that of Hänel, cited above. For the post-Theodosian Novellae the edition is, Hänel, *Novellae Constitutiones Imperatorum*, etc., Bonn, 1844 (a part of Hänel's *Corpus Legum* mentioned above). Some

of the more important edicts and rescripts preserved in inscriptions are given by Bruns, *Fontes* (see below, § 29).

25. The Remains of the Leges Regiae and the Twelve Tables. — The fragments of the so-called *leges regiae*, together with a citation of all the literary references to them, are given by Bruns, *Fontes*, pp. 1–15. Since the beginning of the sixteenth century, attempts have been made to arrange the extant fragments of the Twelve Tables in their original order. The modern text was practically established by Dirksen, 1824. The work of Dirksen was improved by the more searching philological criticism of R. Schöll, 1867. A text of these fragments, based on the recensions of Dirksen and Schöll, together with the citation of all the literary references to them, is given by Bruns, pp. 15–40.

26. The Extant Remains of Popular Enactments, Edicts, and Decrees of the Senate. — Of the *leges* enacted subsequent to the Twelve Tables only a few have been transmitted independently and in their original form. Information regarding by far the greater part of the *leges* (including *plebiscita*) has been obtained entirely from the literature. Those transmitted in their original phraseology in inscriptions are given, in convenient form, by Bruns, pp. 45–160, accompanied by notes on the history of their recovery, their present place of preservation, and a citation of the literature bearing on their interpretation. Of the lists of *leges* made by modern scholars, those of Rudorff, *Römische Rechtsgeschichte*, I, §§ 10–44, and Lange, *Römische Alterthümer*, II, 3, §§ 132–133, arrange the individual statutes according to their subject-matter; while those of Orelli-Baiter, *Onomasticon Tullianum*, III, pp. 117 f. (Vol. 8 of Orelli's Cicero), and Rein, in Pauly's *Real-Encyclopädie*,

IV, pp. 956 f., arrange them in alphabetical order. Information regarding the contents of the edicts of the praetors is derived from the literature. Considerable knowledge of the *Edictum Perpetuum*, compiled by Salvius Julianus under Hadrian, is derived from the writings of the jurists excerpted in the Digest. Attempts to reconstruct this work began in the sixteenth century. The latest and best attempt is the brilliant work by Lenel, *Das Edictum Perpetuum*, Leipzig, 1883, given also by Bruns, pp. 202 ff. Information regarding the decrees of the senate is obtained chiefly from the literature. Some have also been transmitted independently in the inscriptions. These are given in convenient form by Bruns, pp. 160–202.

27. **Legal Documents of a Private Character.** — Valuable sources, which contribute to the understanding of the law, are the documents and private instruments preserved and transmitted through wax tablets, papyri (in recent times, especially, coming to light in great numbers), and inscriptions. These documents give glimpses of the application of the law to concrete cases or preserve records of legal transactions, which illustrate the requirements of law in much detail in the various forms of contracts, in the execution and opening of wills, in matters of procedure, and in the commonest legal relations of the everyday life of the people. These documents are well illustrated in the selections made by Bruns, pp. 270 ff.

28. **The Non-juristic Literature.** - Among the sources of information for the study of Roman law must be taken into consideration almost the entire body of non-juristic literature, including those Greek authors who treat of Roman history and institutions. In Latin, the works of Cicero are the most fruitful. Gellius furnishes much information

in matters of public and private law. In public law and constitutional matters, Livy and the other historians contribute most. The rhetoricians and grammarians furnish useful material. In certain subjects information is drawn from the agricultural writers, — Cato, Varro, Columella. Even the poets and the commentators on the poets, especially Donatus on Terence, Servius on Vergil, and the scholia of Acro and Porphyrio on Horace furnish information on matters of detail. Plautus makes numerous references to matters of a legal character, using business and legal terms with great frequency. Owing, however, to the uncertain relation of his plays to their Greek originals, the plays of Plautus cannot be considered unreservedly as contributing to a knowledge of the early law of Rome. A valuable little book showing the references to legal matters in the works of the non-juristic Latin authors is *Précis des Institutions du Droit Privé de Rome*, by Gaston May and Henri Becker, Paris, 1892. A few of the many books of this character, devoted either to single authors or to classes of authors, are, for Plautus, E. Costa, *Il Diritto Privato Romano* (in the comedies of Plautus), Turin, 1890; for Cicero, F. Keller, *Semestrium ad M. Tullium Ciceronem libri tres*, Zürich, 1842; Gasquy, *Cicéron Jurisconsulte*, Paris, 1887; Roby, *Roman Private Law*, Vol. 2 (Appendix), Cambridge, 1902; for the poets, Henriot, *Mœurs juridiques et judiciaires de l'ancienne Rome d'après les poètes latins*, Paris, 1865; Benech, *Sur les classiques latins* (Horace, Persius, Martial, Juvenal), Paris, 1853.

29. **Books of Selections from the Sources.** — Besides the *Corpus Iuris Civilis* some of the books referred to above as giving extant sources in a convenient form are Mommsen, Krüger and Studemund, *Collectio librorum iuris anteiusti-*

niani, 3 vols., Berlin, 1878–1899; Huschke, *Iurisprudentiae anteiustinianae quae supersunt*, Leipzig, 1886. These two works contain the extant remains of the pre-Justinian literature. The former offers the more critical and authoritative text, while the latter is more convenient, being in one volume. It has also useful indices and a valuable collection of parallel passages. Bruns, *Fontes iuris Romani antiqui*, 6th ed., by Mommsen and Gradenwitz, Freiburg and Leipzig, 1893. This book gives the most important legal monuments which have been transmitted in inscriptions, and also a collection of documents illustrating private legal transactions. Lenel, *Palingenesia iuris civilis*, 2 vols., Leipzig, 1888–1889, a restoration of the excerpts of the classical jurists to their original connection. The style of each individual writer is best seen from the use of this very valuable book. *Corpus iuris anteiustiniani*, etc., Bonn, 1842, a collection of pre-Justinian sources edited by a number of professors at Bonn.

INTRODUCTORY NOTE TO POMPONIVS, D. 1. 2. 2, DE ORIGINE IVRIS

1. The following selection by Sextus Pomponius on the origin and development of Roman law, the history of the magistracies and the most important jurists of Rome from the earliest time to his own day, is a fragment of a work by that author preserved in Justinian's Digest. Works on the history of the development of law apparently received but little attention from Roman juristic writers. The importance of this fragment lies in the fact that it furnishes the only historical account of Roman law transmitted to modern times, and that it was considered of sufficient importance by the compilers of Justinian's Digest to be placed as an opening chapter, introducing law students to the study of that work.

2. Nothing is known of the personal history of Pomponius; but the period in which he flourished is clearly established by the extant fragments of his works. He wrote under the reigns of Hadrian, Antoninus Pius, and Marcus Aurelius.

3. The Manual (*liber singularis enchiridii*), of which this selection formed a part, was written in the reign of Hadrian; the last jurist mentioned in its enumeration of law writers and teachers being the celebrated Salvius Julianus, who flourished under Hadrian and prepared, by that emperor's direction, the *Edictum Perpetuum*.

4. Pomponius was the most voluminous juristic writer of the second century of the Empire. Although he was the

author of numerous works covering various departments of the law, he lacked originality and independence in scholarship. He was not a jurist of the first rank, but he was an industrious writer of commentaries and made much use of the literature of his predecessors. Of the few authors whose works were drawn upon extensively in the compilation of the Digest, Pomponius stands in the second group, ranked according to the amount of material supplied.

5. Although Pomponius was not the most productive of Roman juristic writers, an enumeration of his works will give a fair idea of the fertility of a typical Roman lawyer:—

(1) *Libri ex Sabino*, a commentary in 36 books, on the *ius civile* according to the arrangement of a similar work of the distinguished jurist, Massurius Sabinus.

(2) *Ad edictum libri*, a commentary on the praetorian edict, containing at least 83 books (D. 38, 5, 1, 14. The subject-matter here indicates the probability of almost as many more).

(3) *Ad Q. Mucium* (*Scaevolam*) *lectionum libri*, a commentary in 39 books, according to the arrangement of Mucius in his treatise on the *ius civile*.

(4) *Ex Plautio libri*, a commentary on the jurist Plautius in 7 books.

(5) *Epistularum libri*, legal opinions in epistolary form in 20 books.

(6) *Variae lectiones*, miscellaneous discussions of legal questions in 15 books (or possibly in 41 books).

(7) *De stipulationibus*, a treatise on stipulations in at least 8 books.

(8) *De senatus consultis libri*, a commentary on the decrees of the senate in 5 books.

(9) *Digestorum ab Aristone libri*, a commentary on the Digest of Aristo in at least 5 books.

(10) *Fideicommissorum libri*, a work on testamentary trusts in 5 books.

(11) *Regularum liber singularis*, a book of legal definitions.

(12) *Liber singularis enchiridii*, a small handbook intended for students, of which the following fragment is all that has been transmitted.

6. The sources for this historical survey are unknown. Sanio has endeavored to show that Varro was Pomponius's chief authority. The evidence is, however, not conclusive —(*Varroniana in den Schriften der röm. Juristen*, Leipzig, 1867).

7. The results of the controversy regarding the historical value of the fragment may be stated briefly: the contributions of Pomponius to matters contemporaneous or approaching his own day are of great worth; those which concern the republican period and the earliest developments of Roman legal science are, as a rule, to be held in suspicion.

8. The selection falls into three subdivisions: —

(1) The origin and development of Roman law, §§ 1–12.

(2) The magistrates and administration of law, §§ 13 34.

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SELECTED TEXTS FROM THE ROMAN LAW

DE ORIGINE IVRIS ET OMNIVM MAGISTRATVVM ET SVCCESSIONE PRVDENTIVM

Pompon. D. 1, 2, 2, pr. Necessarium itaque nobis videtur ipsius iuris originem atque processum demonstrare.

1. Et quidem initio civitatis nostrae populus sine lege certa, sine iure certo primum agere instituit omniaque manu a regibus gubernabantur.

2. Postea aucta ad aliquem modum civitate ipsum Romulum traditur populum in triginta partes divisisse, quas partes curias appellavit propterea, quod tunc rei

1. **nobis**: the name of the author and the title of the work from which the excerpt is made stand at the beginning of each lex (or fragment) in the Digest, and hence the personal style frequently occurs. Cf. Introd. 15.

3. **sine lege ... sine iure**: *without definite statute or customary law.* For the meaning of *lex* and *ius* in this place, see Introd. 1 and 2, also notes on *institia*, p. 72 and *ex non*, p. 73.

4. **agere instituit**: *began to live, i.e.* at this early period the people were governed by local customs rather than by law.

5. **manu**: *with discretionary authority.* The tradition represents the kings as ruling with absolute authority, although the institutions of the period were those of self-government. In the monarchy, as in the republic, the people were the ultimate source of political power.

8. **curias**: not connected etymologically with *cura.* The true origin of the word is uncertain. Other instances of false

publicae curam per sententias partium earum expediebat. Et ita leges quasdam et ipse curiatas ad populum tulit, tulerunt et sequentes reges. Quae omnes conscriptae exstant in libro Sexti Papirii, qui fuit illis temporibus, quibus Superbus Demarati Corinthii filius, ex principalibus viris. Is liber, ut diximus, appellatur ius civile Papirianum, non quia Papirius de suo quicquam ibi adiecit, sed quod leges sine ordine latas in unum composuit.

3. Exactis deinde regibus lege tribunicia omnes leges hae exoleverunt iterumque coepit populus Romanus incerto magis iure et consuetudine aliqua uti quam per latam legem, idque prope viginti annis passus est.

etymologies found in legal writers are: *mutuum*, as if from *meo tuum*; *testamentum*, from *testatio mentis*; *servus*, from *servare*. Cf. also note on *quasi*, p. 106.

2. **leges . . . tulit**: *proposed measures* for the enactment of the *comitia curiata*. It was a fundamental principle of the constitution that law-making required the coöperation of the people and the king or magistrate. The king, therefore, is not law-giver, but, having the sole right of initiative, he is in a position to control legislation. For the process of passing a *lex*, see note on *latam legem* below.

6. **ius...Papirianum**: the reference is to the so-called *leges regiae*, cf. Introd. 3. The statement of the text that the *ius Papirianum* was a collection of *leges curiatae* which lost their validity after the overthrow of the Tarquins, is not supported by any other author. The title of this work as "ius *civile* Papirianum" is also an invention of Pomponius, cf. Serv. *Aen.* 12, 836, where the work is referred to as *de ritu sacrorum*, a title giving an indication of the real contents of the book.

11. **latam legem**: the various steps in the process of enacting a statute (*lex*) were as follows: —

(1) *Legis latio*, the preparation and presentation of a bill by a magistrate (*legem ferre ad populum*). The proposer was called *legis lator*, *auctor legis*, or *suasor legis*. The bill must be published at least three market days (*per trinum nundinum*) before it could be submitted to an assembly for a vote.

(2) *Legis rogatio*, the magistrate's formal submission of the bill for acceptance or rejection by

4. Postea ne diutius hoc fieret, placuit publica auctoritate decem constitui viros, per quos peterentur leges a Graecis civitatibus et civitas fundaretur legibus, quas in tabulas eboreas perscriptas pro rostris composuerunt, ut possint leges apertius percipi, datumque est eis ius eo anno in civitate summum, uti leges et corrigerent, si opus esset, et interpretarentur neque provocatio ab eis sicut a reliquis magistratibus fieret. Qui ipsi animadverte-

the vote of the assembly. The formula for the introduction of a rogatio was: *Velitis, Iubeatis hoc, Quirites, Rogo*. The people voted at once, by curiae, centuries, or tribes; during the early Republic, *viva voce;* after about 139 B.C., by ballot (*tabella*). Affirmative ballots were inscribed *VR* (*uti rogas*); negative ballots, *A* (*antiquo*).

(3) *Renuntiatio*. The result of the ballot was announced at once, and if more than one half of the ballots were affirmative, the *rogatio* became a *lex* (*lex perlata, perrogata*).

(4) *Publicatio legis*. After the enactment of a *lex*, it was published on whitewashed wooden tablets or copper plates (*legem figere, unde de plano recte legi possit*). The validity of the law was not, however, dependent on the fact of publication, since all citizens, in theory, had taken part in its enactment.

4. **eboreas**: this is evidently a mistake of the copyist. *Roboreas* and *aereas* have been suggested. Ivory belongs rather to the luxury of the Empire. Laws were usually published on stone, copper, or wooden tablets; the Twelve Tables, according to the tradition, on copper. — **pro rostris**: used for the Forum. The term *rostra* was not in use until after the capture of the Latin fleet at Antium, 338 B.C. (Liv. 8, 14, 12). For the Decemvirate and the Twelve Tables, see Liv. 3, 31 f., and Dion. Bk. 10, also Introd. 4.

5. **ius summum**: *supreme authority*.

7. **provocatio ab eis**, sc. *Decemviris:* such magistrates, elected for a special purpose, the Romans called *magistratus extraordinarii*. By a *lex Valeria* (B.C. 509?) every sentence of a magistrate against the life of a Roman citizen might be appealed to the people. Under the monarchical and republican constitution of Rome, the pardoning power was an attribute of the people's sovereignty.

runt aliquid deesse istis primis legibus ideoque sequenti anno alias duas ad easdem tabulas adiecerunt et ita ex accedenti appellatae sunt leges duodecim tabularum. Quarum ferendarum auctorem fuisse decemviris Hermodorum quendam Ephesium exulantem in Italia quidam rettulerunt.

5. His legibus latis coepit (ut naturaliter evenire solet, ut interpretatio desideraret prudentium auctoritatem) necessariam esse disputationem fori. Haec disputatio et hoc ius, quod sine scripto venit compositum a prudentibus, propria parte aliqua non appellatur, ut ceterae partes iuris suis nominibus designantur, datis propriis nominibus ceteris partibus, sed communi nomine appellatur ius civile.

2. duas ad easdem tabulas adiecerunt: Cicero calls these two tables *iniquae leges*, because they 'forbade intermarriage between patrician and plebeian,' probably therein simply confirming the previous customary law. — **ex accedenti**: *i.e.* by addition of these two to the ten tables published in the previous year. The first ten tables were ratified by the *comitia centuriata* when proposed by the Decemviri. The remaining two were submitted to the *comitia* by the consuls, after the overthrow of the second Decemvirate.

4. auctorem: Hermodorus is called by Pliny, *N. H.* 34, 5, 21, *interpres*. He further says that a statue was erected to Hermodorus in the Forum at public expense.

8. desideraret: *required*. — **disputationem fori**: the *responsa* delivered in writing to the court by the advocates led to controversy and discussion of principles. This was conducive to the development of a scientific law literature. The professional duties of the American lawyer were regularly performed at Rome, partly by the *iuris consulti*, *iuris prudentes*, who were trained jurists, and partly by the *advocati*, *oratores*, who were professional pleaders, but were not reckoned among the jurists; cf. the English solicitor and barrister.

9. Haec disputatio . . . appellatur ius civile: 'interpretations of the law came to have authority as unwritten law, and so were eventually recognized as a source of law (jurist-made law),

6. Deinde ex his legibus eodem tempore fere actiones compositae sunt, quibus inter se homines disceptarent: quas actiones ne populus prout vellet institueret, certas sollemnesque esse voluerunt et appellatur haec pars iuris legis actiones, id est legitimae actiones. Et ita eodem paene tempore tria haec iura nata sunt; lege duodecim tabularum ex his fluere coepit ius civile, ex isdem legis actiones compositae sunt. Omnium tamen harum et interpretandi scientia et actiones apud collegium pontificum erant, ex quibus constituebatur, quis quoquo anno praeesset privatis. Et fere populus annis prope centum hac consuetudine usus est.

7. Postea cum Appius Claudius proposuisset et ad formam redegisset has actiones, Gnaeus Flavius scriba eius

but they did not receive a distinct name as did the praetorian law (*ius honorarium*, *ius praetorium*), the term *ius civile* being regarded as including the law growing out of scientific interpretation.' Like the praetorian edict, this *iuris prudentia* became a *viva vox iuris civilis*. Cf. Introd. 8.

1. **ex his legibus**: there can be no doubt that long before the Twelve Tables, procedure and legal transactions were characterized by definitely prescribed and formal words of style. Although originally a natural growth, the *legis actiones* were developed by the pontiffs, who gave them a technical character, requiring at first their own professional interpretation. Of these *actiones*, as *genera agendi*, there were five. See Sohm, *Institutes of Roman Law* (Eng. trans.), Oxf., 1892, p. 152.

6. **lege**: the reading is doubtful. Mommsen proposes after *nata sunt*, *lataque lege*, abl. abs. The meaning is: so there arose almost at the same time these three parts of the law: the Twelve Tables; from these flowed the *ius civile*; and likewise from these were developed the *legis actiones*.

13. **Appius Claudius Caecus** (censor 312): he was not a pontiff himself, as his elogium shows (*C. I. L.*, I, p. 287); but careful observation of the pontiffs' method of procedure in various cases enabled him to prepare the work published by Flavius. This publication of the calendar and the *actiones*, which had hitherto been

libertini filius subreptum librum populo tradidit, et adeo gratum fuit id munus populo, ut tribunus plebis fieret et senator et aedilis curulis. Hic liber, qui actiones continet, appellatur ius civile Flavianum, sicut ille ius civile Papirianum, nam nec Gnaeus Flavius de suo quicquam adiecit libro. Augescente civitate quia deerant quaedam genera agendi, non post multum temporis spatium Sextus Aelius alias actiones composuit et librum populo dedit, qui appellatur ius Aelianum.

8. Deinde cum esset in civitate lex duodecim tabularum et ius civile, essent et legis actiones, evenit, ut plebs in discordiam cum patribus perveniret et secederet sibique iura constitueret, quae iura plebiscita vocantur. Mox cum

the secret of the patricians, occurred about 304 B.C., and practically completed the work of making the two orders equal before the law. The Twelve Tables had published a large part of the law, but the legal remedies were still within the control and subject to the manipulation of the patrician pontiffs. This work of Flavius is the first literary effort in Roman jurisprudence. It is probable that, owing to the political character of Appius Claudius and his active demagogism against the patricians, this book was not published against his will (*subreptum*); cf. Mommsen, *Römische Forschungen*, I, 301, or the same article in his *Roman History*, I, Appendix, I (Eng. trans.). — **proposuisset**: the connection shows that this word does not have its usual meaning of *publish, exhibit in a public place*, but *draw up, collect*, in the sense of *composuisset*.

6. **Augescente civitate**: with the new legislation after the Twelve Tables, new *actiones* were required. The *ius Flavianum* dealt only with the law of the Tables. The work of Aelius indicated what old remedies were still in force, and made known the new ones required by more recent legislation. *Ius Aelianum* was published about 204 B.C.

13. **plebiscita**: bills passed by the assembly of the plebeians, organized by tribes (*concilium plebis*), when the *rogatio* (cf. Introd. 8) was submitted by the plebeian tribune; cf. definition, p. 75 of text. *Concilium plebis* (an assembly composed of plebeians only) should not be con-

revocata est plebs, quia multae discordiae nascebantur de his plebiscitis, pro legibus placuit et ea observare lege Hortensia, et ita factum est, ut inter plebiscita et legem species constituendi interesset, potestas autem eadem esset.

9. Deinde quia difficile plebs convenire coepit, populus certe multo difficilius in tanta turba hominum, necessitas ipsa curam rei publicae ad senatum deduxit, ita coepit senatus se interponere et quidquid constituisset observabatur, idque ius appellabatur senatus consultum.

10. Eodem tempore et magistratus iura reddebant et ut scirent cives, quod ius de quaque re quisque dicturus esset, seque praemunirent, edicta proponebant. Quae edicta

fused with *comitia tributa* (an assembly of the entire *populus* according to tribal organization). By the lex Hortensia, 287 B.C. the laws passed by the *concilium plebis* were binding upon the whole *populus*. Before that law, *plebiscita* were binding upon plebeians only, unless, when they affected the whole state, they were ratified by the comitia centuriata (or possibly by the senate alone). After the Hortensian law, the only difference between *plebiscita* and *leges* was in form and name; their force was identical. Cicero was banished by a *plebiscitum* and recalled by a *lex*. With true Roman precision in legal matters, enactments were often called *lex plebeive scitum* or *lex sive id plebi scitum est*.

10. **senatus consultum**: a bill which passed the senate without eliciting the veto of a magistrate. See Introd. 6 and definition, p. 75 of the text. The senate was in theory an advisory body of the king in the monarchy, and of the consuls in the republic. During the best days of the republic, the *leges* passed by the comitia required the sanction of the patrician part of the senate (*auctoritas patrum*). In the late republican period, the senate issued decrees in cases of emergency, which seem to have had the force of law. In the early empire, the decrees of the senate supplanted the *leges* of the comitia. Under the régime whereby the power was divided between princeps and senate, SCC were counted among the sources of law.

praetorum ius honorarium constituerunt; honorarium dicitur, quod ab honore praetoris venerat.

11. Novissime sicut ad pauciores iuris constituendi vias transisse ipsis rebus dictantibus videbatur per partes, evenit, ut necesse esset rei publicae per unum consuli (nam senatus non perinde omnes provincias probe gerere poterat); igitur constituto principe datum est ei ius, ut quod constituisset, ratum esset.

12. Ita in civitate nostra aut iure, id est lege, constituitur, aut est proprium ius civile, quod sine scripto in sola prudentium interpretatione consistit, aut sunt legis actiones, quae formam agendi continent, aut plebiscitum, quod sine auctoritate patrum est constitutum, aut est magistratuum edictum, unde ius honorarium nascitur, aut senatus consultum, quod solum senatu constituente inducitur sine lege,

1. **ius honorarium**: see Introd. 5 and definition, p. 76 of the text.

3. **Novissime**: 'finally, inasmuch as it seemed that the development of the law had gradually passed under the control of fewer persons, circumstances themselves partially calling for it, it came about now that the necessity of caring for the welfare of the state devolved upon one man.'

6. **non perinde**, sc. *ac olim: not as formerly*, cf. Tac. *Germ.* 5, 4, *haud perinde afficiuntur*; Suet. *Aug.* 80, *non perinde valebat.*

7. **ius**: 'authority was conferred upon him (by the *lex de imperio*) so that whatever he ordained was valid (as law).'

9. **iure, id est lege**: 'our state is therefore governed by the old customary law as it stands in the Twelve Tables, or that peculiar *ius civile*, which is unwritten and rests upon the interpretation of the jurists.' Cf. note on *Haec disputatio*, p. 48, and definitions, p. 75 of the text.

10. **proprium ius civile**: it was a peculiar feature of Roman legal development, that interpretation of the jurists and legal literature attained a place of such great importance and, without any constitutional recognition, were counted by the jurists among the sources of law.

12. **formam agendi**: *rules of procedure.*

aut est principalis constitutio, id est ut quod ipse princeps constituit pro lege servetur.

13. Post originem iuris et processum cognitum consequens est, ut de magistratuum nominibus et origine cognoscamus, quia, ut exposuimus, per eos qui iuri dicundo praesunt effectus rei accipitur; quantum est enim ius in civitate esse, nisi sint, qui iura regere possint? Post hoc dein de auctorum successione dicemus, quod constare non potest ius, nisi sit aliquis iuris peritus, per quem possit cottidie in melius produci.

14. Quod ad magistratus attinet, initio civitatis huius constat reges omnem potestatem habuisse.

15. Isdem temporibus et tribunum celerum fuisse constat. Is autem erat qui equitibus praeerat et veluti secundum locum a regibus optinebat. In quo numero fuit Iunius Brutus, qui auctor fuit regis eiciendi.

16. Exactis deinde regibus consules constituti sunt duo, penes quos summum ius uti esset, lege rogatum est. Dicti

6. **effectus rei**: 'the operation of the law is perceived.' — **quantum est ius esse**: 'of what value is it that there is law in a state, unless.'

7. **auctorum**, sc. *iuris*: *jurists*, cf. Introd. 8.

9. **iuris peritus, per quem possit in melius produci**: the Roman jurists were designated by the terms *iuris periti*, *iuris prudentes*, *iuris consulti*, *iuris auctores*, and *iuris conditores* without distinction of meaning. It is a peculiarity of the Romans that they set a very high value on the authority of jurists and their writings. (Cf. the comparative absence of text-writers' authority in our own system of law and the weight of a judicial decision.) Our nearest parallel to the *responsa prudentium* and the text-book law of the Romans is the series of Reported Cases.

13. **tribunum celerum**: tradition assigned as deputies of the king and subject to his appointment three or nine *tribuni militum* (Varro, *L. L.* 5, 81; Serv. *Aen.* 5, 560); nine *tribuni celerum*; a *praefectus urbi* (Tac. *Ann.* 6, 11; Liv. 1, 59; Dion. 2, 12).

18. **lege rogatum**: *declared by a law*, i.e. the *lex curiata de im-*

sunt ab eo, quod plurimum rei publicae consulerent. Qui tamen ne per omnia regiam potestatem sibi vindicarent, lege lata factum est, ut ab eis provocatio esset neve possent in caput civis Romani animadvertere iniussu populi. Solum relictum est illis, ut coercere possent et in vincula publica duci iuberent.

17. Post deinde cum census iam maiori tempore agendus esset et consules non sufficerent huic quoque officio, censores constituti sunt.

18. Populo deinde aucto cum crebra orerentur bella et quaedam acriora a finitimis inferrentur, interdum re exigente placuit maioris potestatis magistratum constitui, itaque dictatores proditi sunt, a quibus nec provocandi ius fuit et quibus etiam capitis animadversio data est. Hunc magistratum, quoniam summam potestatem habebat, non erat fas ultra sextum mensem retineri.

perio. Cf. note on *latam legem*, p. 46; Cic. *de Leg. Agr.* 2, 10, 26; *ad Fam.* 1, 9, 25; *de Rep.* 2, 13, 25. — **ab eo** = *ob eam rem*. The idea of colleagueship (*con-salio*, *con-sules*, *partners*) as a check on the abuse of *imperium*, probably accounts for the origin of the name.

3. ab eis provocatio: the *imperium* gave the consuls absolute authority in military jurisdiction. This power was restricted by the *lex Valeria* (about B.C. 509), so that in capital cases within the city walls an appeal lay from them to the people; hence the distinction between *imperium domi* and *imperium militiae*, and *fasces* with and without *secures*. The consuls retained an exceptional authority in certain criminal matters, *e.g.* they condemned women, aliens, and slaves, and caused the sentence to be carried into execution. They retained civil jurisdiction, until the office of Praetor Urbanus was established.

8. censores constituti sunt: the censorship was established about 443 B.C. It was originally the duty of the censor to determine the military strength of the state at certain intervals. All citizens were registered in their proper class, according to their wealth, and on the basis of this census military duties and taxes were imposed.

15. non erat fas ultra sextum mensem retineri: *fas* = *ius*, as

19. Et his dictatoribus magistri equitum iniungebantur sic, quo modo regibus tribuni celerum. Quod officium fere tale erat, quale hodie praefectorum praetorio, magistratus tamen habebantur legitimi.

20. Isdem temporibus cum plebs a patribus secessisset anno fere septimo decimo post reges exactos, tribunos sibi in monte sacro creavit, qui essent plebeii magistratus. Dicti tribuni, quod olim in tres partes populus divisus erat et ex singulis singuli creabantur, vel quia tribuum suffragio creabantur.

21. Itemque ut essent qui aedibus praeessent, in quibus omnia scita sua plebs deferebat, duos ex plebe constituerunt, qui etiam aediles appellati sunt.

often. A longer term of office suggested the possibility of a return to monarchy. The dictator's *imperium* was originally unrestricted *domi* as well as *militiae*. He administered martial law within the city and had full military, but not civil, jurisdiction. The praetors continued to sit in their courts, the consuls were continued in command of their armies as minor colleagues of the dictator, and other magistrates continued in office.

7. **plebeii magistratus**: for the origin of the tribunate of the plebs see the sources, Liv. 2, 33; Dion. 6, 89; Isidor. *Orig.* 9, 3, 29; Lydus, *de Magistr.* 1, 38, 44. The *tribuni plebis* were at first two, then four, and afterwards ten in number. They had the right of intercession, within the pomerium, against every expression of magisterial authority, limited only by the veto of their colleagues and the *provocatio* to the *comitia centuriata* in capital cases. After the *lex Hortensia*, the tribunes could initiate legislation (*plebiscita*) and could eventually summon the senate.

13. **aediles appellati sunt**: the origin of this name is uncertain. The derivation of the word is assigned by Pomponius to the aediles' duty of keeping the archives in their custody in the temple of Ceres, by Varro to their oversight of the repair of temples, 'aedilis, qui aedes sacras et privatas procuraret,' *L. L.* 5, 81 (see Mommsen, *Staatsrecht*, 2, p. 479). Their original title and function were possibly something still different (Dion. 6, 90).

22. Deinde cum aerarium populi auctius esse coepisset, ut essent qui illi praeessent, constituti sunt quaestores, qui pecuniae praeessent, dicti ab eo quod inquirendae et conservandae pecuniae causa creati erant.

23. Et quia, ut diximus, de capite civis Romani iniussu populi non erat lege permissum consulibus ius dicere, propterea quaestores constituebantur a populo, qui capitalibus rebus praeessent; hi appellabantur quaestores parricidii, quorum etiam meminit lex duodecim tabularum.

24. Et cum placuisset leges quoque ferri, latum est ad populum, uti omnes magistratu se abdicarent, quo decemviri constituti anno uno cum magistratum prorogarent sibi et cum iniuriose tractarent neque vellent deinceps sufficere magistratibus, ut ipsi et factio sua perpetuo rem publicam occupatam retineret, nimia atque aspera dominatione eo rem perduxerant, ut exercitus a re publica secederet. Initium fuisse secessionis dicitur Verginius quidam, qui cum animadvertisset Appium Claudium contra ius, quod ipse ex

3. **inquirendae et conservandae pecuniae causa**: cf. Varro, *L. L.* 5, 81, 'quaestores a quaerendo, qui conquirerent publicas pecunias et maleficia.' The functions of the *quaestores aerarii* and *parricidii*, usually identified, are here regarded as distinct.

11. **quo decemviri**, supply *crearentur legum scribendarum causa. Itaque decemviri* **constituti**: as something has evidently dropped out (Mommsen). *Quo* without the comparative, A. & G. 317, *b*, N. 2; B. 282, *a*. *Anno uno*, abl. degree of difference.

12. **prorogarent. . . neque vellent sufficere magistratibus**: 'held over for one year . . . and were unwilling to give way to the regular magistrates.'

18. **contra ius, quod ipse in duodecim tabulas transtulerat**: cf. Liv. 3, 44, *advocati* (*Verginiae*) *postulant, ut* (*App. Claudius*) *lege ab ipso lata vindicias det secundum libertatem. Vindicias ab aliquo abdicere* means to refuse one possession, *vindicias dicere secundum aliquem*, to grant one possession of the disputed person or thing, during the adjudication of the

vetere iure in duodecim tabulas transtulerat, vindicias filiae suae a se abdixisse et secundum eum, qui in servitutem ab eo suppositus petierat, dixisse captumque amore virginis omne fas ac nefas miscuisse, indignatus, quod vetustissima iuris observantia in persona filiae suae defecisset (utpote cum Brutus, qui primus Romae consul fuit, vindicias secundum libertatem dixisset in persona Vindicis Vitelliorum servi, qui proditionis coniurationem indicio suo detexerat) et castitatem filiae vitae quoque eius praefer- endam putaret, arrepto cultro de taberna lanionis filiam interfecit in hoc scilicet, ut morte virginis contumeliam stupri arceret, ac protinus recens a caede madenteque adhuc filiae cruore ad commilitones confugit. Qui universi de Algido, ubi tunc belli gerendi causa legiones erant, relictis ducibus pristinis signa in Aventinum transtulerant, omnisque plebs urbana mox eodem se contulit, populique consensu partim in carcere necati. Ita rursus res publica suum statum recepit.

25. Deinde cum post aliquot annos duodecim tabulae latae sunt et plebs contenderet cum patribus et vellet ex

issue. The legal wrong here arose from a direct violation of a provision of the Twelve Tables, namely, that in case of disputed freedom (*liberalis causa*) the presumption should be in favor of liberty (*secundum libertatem*). Verginius was, therefore, deprived unlawfully of the possession of his daughter, over whom, as his *filia-familias*, he had a real right, until Appius proved his right of proprietorship (*dominica potestas*) and the claim had been judicially determined.

2. **qui** (*i.e.* Icilius) **in servitutem ab eo** (*i.e.* App. Claudius) **suppositus petierat**: *had claimed her as a slave.*

4. **indignatus**, sc. *Verginius*. — **vetustissima iuris observantia**, i.e. *vindicias dicere secundum libertatem.*

10. **putaret**, read *putans* (Mommsen).

16. **partim in carcere necati**: after *partim* supply *in exilium acti decemviri, partim*, etc.

18. **Deinde cum post aliquot**: read *annos, quam duodecim tabu-*

suo quoque corpore consules creare et patres recusarent, factum est, ut tribuni militum crearentur partim ex plebe, partim ex patribus consulari potestate. Hique constituti sunt vario numero, interdum enim viginti fuerunt, interdum plures, nonnumquam pauciores.

26. Deinde cum placuisset creari etiam ex plebe consules, coeperunt ex utroque corpore constitui. Tunc, ut aliquo pluris patres haberent, placuit duos ex numero patrum constitui; ita facti sunt aediles curules.

27. Cumque consules avocarentur bellis finitimis neque esset qui in civitate ius reddere posset, factum est, ut praetor quoque crearetur, qui urbanus appellatus est, quod in urbe ius redderet.

lae latae sunt, *plebs contenderet*, etc., according to the suggestion of Mommsen.

2. **tribuni militum consulari potestate**: in 445 B.C. the plebeians demanded that the consulate be opened to their order. The patricians declined to give their assent, but yielded to a compromise, by which the people should determine each year whether they preferred consuls or military tribunes with consular power. This was a makeshift for opening the highest magistracy to the plebeians, without altering the framework of the constitution or suffering from further revolution. The tribunes *consulari potestate* were always more than two in number, never more than six (not twenty as the text says), and the office passed away with the admission of the plebeians to the consulship (367 B.C.).

7. **ut aliquo pluris** (sc. *iuris*, 'power') **patres haberent, placuit duos** (sc. *magistratus*) **ex numero patrum constitui**, sc. *qui ludos curarent*, or something of the kind, which possibly has fallen out. The office of curule aedile, whose original duties are uncertain, was created in 366 B.C. as an offset to the plebeian aedileship. The duties of these officers, at first distinct, became practically assimilated. There were two of each kind.

11. **praetor crearetur**: the name was originally applied to the consuls (*prae-itores*, leaders, commanders). As only a single praetor was appointed, the constitutional principle of colleagueship in all magistracies was not observed.

28. Post aliquot deinde annos non sufficiente eo praetore, quod multa turba etiam peregrinorum in civitatem veniret, creatus est et alius praetor, qui peregrinus appellatus est ab eo, quod plerumque inter peregrinos ius dicebat.

29. Deinde cum esset necessarius magistratus qui hastae praeessent, decemviri in litibus iudicandis sunt constituti.

30. Constituti sunt eodem tempore et quattuorviri qui curam viarum agerent, et triumviri monetales aeris argenti

Theoretically, however, the praetor was regarded as a third consul, added to that college to relieve the consuls, who were busy in the field, of their judicial duties. The praetor continued to be the sole civil magistrate in Rome until the appointment of the praetor peregrinus, a century and a quarter later. The original praetor was called praetor urbanus, *i.e.* praetor *qui inter cives ius dicit*; in distinction from him, the new praetor came to be known at a later time as praetor peregrinus, an abbreviated title for the praetor *qui inter peregrinos ius dicit* or *qui inter cives et peregrinos ius dicit*.

1. **Post aliquot annos**: *aliquot*, meaning usually 'a few,' covers here an interval of one hundred and twenty-five years. The necessity for the creation of this new office arose from the changed conditions resulting from the first Punic war. The date of its establishment is uncertain, assigned by Liv. to 242 B.C., by Lydus to 244, and placed by modern authorities at 242 or 247. The full title as shown by the inscriptions is as given above (note on *praetor*, p. 58), cf. also Introd. 5.

5. **qui hastae praeessent**: 'to have jurisdiction in cases involving real rights' (*e.g.* liberty, property), cf. Gai. 4, 16, *festuca autem utebantur quasi hastae loco, signo quodam iusti dominii, quod maxime sua esse credebant quae ex hostibus cepissent; unde in centumviralibus iudiciis hasta praeponitur* (cf. in English law the delivery of a staff as symbol of power and possession in certain conveyances, Blackstone, *Commentaries*, II, Chap. 20). The *decemviri (st)litibus iudicandis* were first mentioned in the Valerio-Horatian laws, 449 B.C. Owing to the restrictions placed on the plebeians, contests over personal liberty became prominent and required a special tribunal (cf. case of Verginia, note on *contra ius*, p. 56).

auri flatores, et triumviri capitales qui carceris custodiam haberent, ut cum animadverti oporteret interventu eorum fieret.

31. Et quia magistratibus vespertinis temporibus in publicum esse inconveniens erat, quinqueviri constituti sunt cis Tiberim et ultis Tiberim, qui possint pro magistratibus fungi.

32. Capta deinde Sardinia, mox Sicilia, item Hispania, deinde Narbonensi provincia totidem praetores, quot provinciae in dicionem venerant, creati sunt, partim qui urbanis rebus, partim qui provincialibus praeessent. Deinde Cornelius Sulla quaestiones publicas constituit, veluti de falso, de parricidio, de sicariis, et praetores quattuor adiecit. Deinde Gaius Iulius Caesar duos praetores et duos aediles qui frumento praeessent et a Cerere cereales constituit.

1. **triumviri capitales**: these were introduced about 289 B.C., and they exercised criminal authority over aliens and, especially, slaves, at first as assistants of the consuls. They put the death sentence into execution, acted as detectives in criminal investigations, exercised police duties, etc., combined with a supervision of the night watch.

5. **quinqueviri constituti sunt cis Tiberim**: originally, at Rome, the duty of providing for the public safety and policing the city was a part of the consular imperium. In their absence, the consuls were at first represented by the praefecti urbi, afterward by the praetor urbanus. The *quinqueviri Cistiberes* had similar duties, though their exact functions cannot now be determined (cf. Mommsen, *Staatsrecht*, 2, 611; Hirschfeld, *Hermes*, 24, 106). — **cis Tiberim et ultis Tiberim**: very rare for *citra . . . ultra; ultis* is not found in Harper's *Lat. Dict.* (cf. *cis . . . uls*, Varr. *L. L.* 5, 83).

15. **et** (sc. *dicerentur*) **a Cerere cereales**: the number was still six in the time of Vespasian (Suet. *Vesp.* 2), *i.e.* two each of the plebeian, curule (patrician), and the cereales (instituted by Caesar). Some of the chief duties of the aediles were: the care of the buildings and public sites of the city (*cura urbis*); the care of the markets (*cura annonae*); the es-

Ita duodecim praetores, sex aediles sunt creati. Divus deinde Augustus sedecim praetores constituit. Post deinde divus Claudius duos praetores adiecit qui de fideicommisso ius dicerent, ex quibus unum divus Titus detraxit et adiecit divus Nerva qui inter fiscum et privatos ius diceret. Ita decem et octo praetores in civitate ius dicunt.

33. Et haec omnia, quotiens in re publica sunt magistratus, observantur; quotiens autem proficiscuntur, unus relinquitur, qui ius dicat; is vocatur praefectus urbi. Qui praefectus olim constituebatur, postea fere Latinarum feriarum causa introductus est et quotannis observatur. Nam praefectus annonae et vigilum non sunt magistratus, sed extra ordinem utilitatis causa constituti sunt. Et tamen hi, quos Cistiberes diximus, postea aediles senatus consulto creabantur.

34. Ergo ex his omnibus decem tribuni plebis, consules

tablishment of regular games (*cura ludorum*). Their influence on the law was exerted through their criminal and civil jurisdiction and the edicts which they issued in the administration of their office (cf. Introd. 5, *edictum aedilicium*).

3. **qui de fideicommisso ius dicerent**: a *fideicommissum* is an informal legacy whose terms were to be carried out by the heir in good faith (*fidei-committere*) according to the request of the testator. The *praetor fideicommissarius* was charged with the settlement of questions growing out of these testamentary trusts.

5. **qui inter fiscum et privatos ius diceret**: the imperial exchequer (*fiscus*) and the senatorial *aerarium* were corporations, *i.e.* artificial persons. Issues involving claims between private persons and the public treasury were tried by the *praetor fiscalis*.

8. **in re publica**: used here by metonymy (like *civitas* occasionally) for *in urbe*.

10. **Qui praefectus olim constituebatur**: instead of *praefectus*, *profectis iis* is suggested, *i.e.* 'for each occasion of the magistrates' departure from the city.'

15. **postea** (sc. *per*) **aĕdiles**, should probably be read (Mommsen).

duo, decem et octo praetores, sex aediles in civitate iura reddebant.

35. Iuris civilis scientiam plurimi et maximi viri professi sunt; sed qui eorum maximae dignationis apud populum Romanum fuerunt, eorum in praesentia mentio habenda est, ut appareat, a quibus et qualibus haec iura orta et tradita sunt. Et quidem ex omnibus, qui scientiam nancti sunt, ante Tiberium Coruncanium publice professum neminem traditur. Ceteri autem ad hunc vel in latenti ius civile retinere cogitabant solumque consultatoribus vacare potius quam discere volentibus se praestabant.

36. Fuit autem in primis peritus Publius Papirius, qui leges regias in unum contulit. Ab hoc Appius Claudius unus ex decemviris, cuius maximum consilium in duodecim tabulis scribendis fuit. Post hunc Appius Claudius eiusdem generis maximam scientiam habuit; hic Centemmanus appellatus est, Appiam viam stravit et aquam Claudiam induxit et de Pyrrho in urbe non recipiendo sententiam tulit. Hunc

3. **Iuris civilis scientiam professi sunt**: with this section, Pomponius begins the enumeration of some of the most famous jurists, with mention of their most important works. *Iuris scientiam profiteri* means to practice and also to give instruction in law. For Ti. Coruncanius and the beginning of a legal profession at Rome, see Introd. 8.

9. **Ceteri autem ad hunc**, etc., translate: 'all others acquainted with law up to his time either intended to keep the *ius civile* unknown or else were usually accessible only to those consulting them, rather than to those wishing to study law.'

10. **solumque consultatoribus vacare**. Instead of *solumque* read: *vel solebant consultatoribus*, etc.

12. **Publius Papirius, qui leges regias contulit**: in the second section, Papirius is called Sextus. For *leges regiae* see Introd. 3 and note on *ius Papirianum*, p. 46.

15. **Post hunc App. Claudius**: from App. Claudius, the Decemvir, Pomponius springs over a period of about 150 years to the Decemvir's great-grandson, App. Claudius Caecus (censor 312); cf. sec. 7 of the text and note on *App.*

etiam actiones scripsisse traditum est primum de usurpationibus, qui liber non exstat. Idem Appius Claudius, qui videtur ab hoc processisse, R litteram invenit, ut pro Valesiis Valerii essent et pro Fusiis Furii.

37. Fuit post eos maximae scientiae Sempronius, quem populus Romanus *σοφὸν* appellavit, nec quisquam ante hunc aut post hunc hoc nomine cognominatus est. Gaius Scipio Nasica, qui optimus a senatu appellatus est, cui etiam publice domus in sacra via data est, quo facilius consuli posset. Deinde Quintus Mucius, qui ad Carthaginienses missus legatus, cum essent duae tesserae positae una pacis altera belli, arbitrio sibi dato, utram vellet referret Romam, utramque sustulit et ait Carthaginienses petere debere, utram mallent accipere.

38. Post hos fuit Tiberius Coruncanius, ut dixi, qui primus profiteri coepit, cuius tamen scriptum nullum exstat, sed responsa complura et memorabilia eius fuerunt. Deinde Sextus Aelius et frater eius Publius Aelius et Publius Atilius maximam scientiam in profitendo habuerunt, ut duo Aelii etiam consules fuerint, Atilius autem primus a populo Sapiens appellatus est. Sextum Aelium etiam Ennius laudavit et exstat illius liber qui inscribitur 'tripertita,' qui liber veluti cunabula iuris continet. Tripertita autem dici-

Claudius, p. 49, supra. In this section, patricians are mentioned in violation of chronological order.

1. **actiones** (*scripsisse*) is evidently a gloss from section 7.

5. **Sempronius**: *i.e.* Publius Sempronius Sophus, consul 304 B.C. The cognomen Sophus occurs several times in the *fasti consulares*.

7. **Gaius Scipio Nasica**: apparently a confusion with Publius Nasica Optimus, consul 191 B.C.

10. **Quintus Mucius**: probably intended for Q. Maximus, cf. Liv. 21, 18, where a similar incident is related (Florus, 2, 6, 7; Gell. 10, 27).

22. **liber qui inscribitur tripertita**: so called because it was com-

tur, quoniam lege duodecim tabularum praeposita iungitur interpretatio, deinde subtexitur legis actio. Eiusdem esse tres alii libri referuntur, quos tamen quidam negant eiusdem esse; hos sectatus ad aliquid est Cato. Deinde Marcus Cato princeps Porciae familiae, cuius et libri exstant, sed plurimi filii eius, ex quibus ceteri oriuntur.

39. Post hos fuerunt Publius Mucius et Brutus et Manilius, qui fundaverunt ius civile. Ex his Publius Mucius etiam decem libellos reliquit, Brutus septem, Manilius tres et exstant volumina scripta Manilii monumenta. Illi duo consulares fuerunt, Brutus praetorius, Publius autem Mucius etiam pontifex maximus.

posed of three parts: *lex tabularum duodecim; interpretatio* (of the Tables); and *legis actiones*. The *ius Flavianum* probably formed the third part of this work, cf. notes on *Appius*, p. 49 and *Augescente*, p. 50.

4. **ad aliquid Cato. Deinde Marcus Cato**: it is suggested by Schöll, *XII. Tab.* p. 24, that the first *Cato* is a gloss. **ad aliquid**, adverbial, *after some time*.

6. **ex quibus ceteri oriuntur**: read *ordiuntur* ('nam auctores posteriores citant passim Catonem neque vero auctorem ullum eo antiquiorem, nisi quod semel laudat Sex. Aelium Celsus,' explains Mommsen). The legal works of Cato Censor are unknown, but his *de Re Rustica* contains important information on the law of contracts. His son is the author of the celebrated *regula Catoniana* (D. 34, 7, 1).

7. **Post hos fuerunt**: Pomponius omits the name of C. Livius Drusus, belonging here (consul 144 B.C.), the author of several works and a jurist whose advice was much sought, of whom Val. Max. 8, 7, 4, says: *ius civile populo benignissime interpretatus est utilissimaque discere id cupientibus monumenta composuit*. Cf. also Cic. *Tusc.* 5, 38, 112; *Brut.* 28, 109. Of the three jurists mentioned in this section, the oldest was M'. Manilius (consul 149 B.C.), one of the speakers in Cic. *de Rep.* and the author of seven books (not three). M. Junius Brutus whom Cic. *Brut.* 34, 130, calls *virum optimum et iuris peritissimum*, was the author of three books, *de iure civili*, in the form of dialogue with his son, in imitation of Greek philosophical writings. P. Mucius (Scaevola) was consul 133 B.C. Pomponius does not mention Mu-

40. Ab his profecti sunt Publius Rutilius Rufus, qui Romae consul et Asiae proconsul fuit, Paulus Verginius et Quintus Tubero, ille stoicus Pansae auditor, qui et ipse consul. Etiam Sextus Pompeius Gnaei Pompeii patruus fuit eodem tempore et Coelius Antipater, qui historias conscripsit, sed plus eloquentiae quam scientiae iuris operam dedit, etiam Lucius Crassus frater Publii Mucii, qui Munianus dictus est; hunc Cicero ait iuris consultorum disertissimum.

41. Post hos Quintus Mucius Publii filius pontifex maximus ius civile primus constituit generatim in libros decem et octo redigendo.

42. Mucii auditores fuerunt complures, sed praecipuae auctoritatis Aquilius Gallus, Balbus Lucilius, Sextus Papi-

cius' cousin, Q. Mucius Scaevola, consul 117 B.C., commonly called Augur, whose *consultatio* Cicero attended as hearer in B.C. 89, shortly before Scaevola's death, Cic. *Lael.* 1, 1; *de Leg.* 1, 4, 13. The Augur should not be confused with the far more distinguished jurist, Q. Mucius Scaevola, Pontifex Maximus, consul 95 B.C., mentioned below.

1. **Ab his profecti sunt**: *i.e.* 'their disciples.' For this meaning of *proficisci*, cf. Cic. *de Div.* 1, 3, 5; 1, 35, 61. Publius Rutilius Rufus, consul 105 B.C., was distinguished as general, statesman, orator, historian, and legal adviser (Cic. *Brut.* 30, 113, *magnum munus de iure respondendi sustinuit*). He was not *proconsul* in Asia, but served there as *legatus* to Q. Mucius Scaevola.

3. **ille stoicus Pansae auditor**: *i.e.* he was pupil of the Stoic philosopher Panaetius, who came to Rome about 156 B.C., and was a member of the Scipionic circle. From that time, Stoic philosophy exercised considerable influence on the development of legal doctrine.

7. **Lucius (Licinius) Crassus Mucianus** (not *Munianus*): a confusion of the great orator L. Licinius Crassus (consul B.C. 95), speaker in Cic. *de Or.*, with P. Licinius Crassus Mucianus (consul 131 B.C.), whom Cicero mentions as jurist also, *e.g. de Or.* 1, 37; 1, 50.

10. **Q. Mucius (Scaevola) pontifex maximus**: he was the first writer to give the *ius civile* scientific, systematic treatment. He is the earliest writer from whose

rius, Gaius Iuventius, ex quibus Gallum maximae auctoritatis apud populum fuisse Servius dicit. Omnes tamen hi a Servio Sulpicio nominantur; alioquin per se eorum scripta non talia exstant, ut ea omnes appetant. Denique nec versantur omnino scripta eorum inter manus hominum, sed Servius libros suos complevit, pro cuius scriptura ipsorum quoque memoria habetur.

43. Servius autem Sulpicius cum in causis orandis primum locum aut pro certo post Marcum Tullium obtineret, traditur ad consulendum Quintum Mucium de re amici sui pervenisse cumque eum sibi respondisse de iure Servius parum intellexisset, iterum Quintum interrogasse et a Quinto Mucio responsum esse nec tamen percepisse, et ita obiurgatum esse a Quinto Mucio; namque eum dixisse turpe esse patricio et nobili et causas oranti ius in quo versaretur ignorare. Ea velut contumelia Servius tactus operam dedit iuri civili et plurimum eos, de quibus locuti sumus, audiit, institutus a Balbo Lucilio, instructus autem maxime a Gallo Aquilio, qui fuit Cercinae; itaque libri complures eius exstant Cercinae confecti. Hic cum in legatione perisset, statuam ei populus Romanus pro rostris posuit, et hodieque exstat pro rostris Augusti. Huius volumina complura exstant: reliquit autem prope centum et octaginta libros.

works excerpts are preserved in the Digest; see Introd. 15.

6. **sed Servius libros suos complevit, pro cuius scriptura**: 'but Servius made use of them in his own books, by virtue of whose writings their memory is still preserved.'

8. **cum in causis orandis primum locum post M. Tullium obtineret**: inasmuch as Q. Mucius was murdered in 82 B.C. and Cicero made his first appearance as an orator in 81, it is impossible that Sulpicius should have held the first place as an orator 'after Cicero,' during the lifetime of Q. Mucius. The incident recounted here is looked upon with suspicion.

44. Ab hoc plurimi profecerunt, fere tamen hi libros conscripserunt: Alfenus Varus Gaius, Aulus Ofilius, Titus Caesius, Aufidius Tucca, Aufidius Namusa, Flavius Priscus, Gaius Ateius, Pacuvius Labeo Antistius Labeonis Antistii pater, Cinna, Publicius Gellius. Ex his decem libros octo conscripserunt, quorum omnes qui fuerunt libri digesti sunt ab Aufidio Namusa in centum quadraginta libros. Ex his auditoribus plurimum auctoritatis habuit Alfenus Varus et Aulus Ofilius, ex quibus Varus et consul fuit, Ofilius in equestri ordine perseveravit. Is fuit Caesari familiarissimus et libros de iure civili plurimos et qui omnem partem operis fundarent reliquit. Nam de legibus vicensimae primus conscribit, de iurisdictione idem edictum praetoris primus diligenter composuit, nam ante eum Servius duos libros ad Brutum perquam brevissimos ad edictum subscriptos reliquit.

1. **Ab hoc plurimi profecerunt**: cf. note on *Ab his*, p. 65. Alfenus Varus (not Gaius, his praenomen was probably Publius), consul suffectus 39 B.C. Horace, *Sat.* 1, 3, 130, may possibly have had this jurist in mind, cf. Acro *ad loc.*

5. **Ex his decem libros octo**: 'of these ten jurists, eight wrote books.'

10. **Caesari familiarissimus**: for the relation of Aulus Ofilius to Julius Caesar and the latter's plan for the codification of the law, see Suet. *Iul.* 44; Isidor. *Orig.* 5, 1, 5.

12. **de legibus vicensimae**: it is not known what this means. Some have thought it to be the title of a work. There was an old law enacted 356 B.C., mentioned by Liv. 7, 16, 7, by which a tax of 5 per cent (*pars vicesima*) was imposed on the value of slaves manumitted. *Vicesima* came to be used as a substantive. Augustus enacted a *lex de vicesima hereditatum* (6 A.D.) which imposed a tax of 5 per cent on the value of inheritances and legacies taken by Roman citizens. This law is here excluded, however, by its date. Others consider *De Legibus* the title of the work, whose contents are now unknown, and *vicensimae* as a corruption which possibly contains the number of books (*viginti*).

13. **edictum praetoris primus diligenter composuit**: *i.e.* he was the first to edit scientifically the praetorian edict.

45. Fuit eodem tempore et Trebatius, qui idem Corneli Maximi auditor fuit, Aulus Cascellius, Quintus Mucius Volusii auditor, denique in illius honorem testamento Publium Mucium nepotem eius reliquit heredem. Fuit autem quaestorius nec ultra proficere voluit, cum illi etiam Augustus consulatum offerret. Ex his Trebatius peritior Cascellio, Cascellius Trebatio eloquentior fuisse dicitur, Ofilius utroque doctior. Cascellii scripta non exstant nisi unus liber bene dictorum, Trebatii complures, sed minus frequentantur.

46. Post hos quoque Tubero fuit, qui Ofilio operam dedit; fuit autem patricius et transiit a causis agendis ad ius civile, maxime postquam Quintum Ligarium accusavit nec obtinuit apud Gaium Caesarem. Is est Quintus Ligarius, qui cum Africae oram teneret, infirmum Tuberonem applicare non permisit nec aquam haurire, quo nomine eum accusavit et Cicero defendit. Exstat eius oratio satis pulcherrima, quae inscribitur pro Quinto Ligario. Tubero doctissimus quidem habitus est iuris publici et privati et complures utriusque operis libros reliquit; sermone etiam antiquo usus affectavit scribere et ideo parum libri eius grati habentur.

2. **Q. Mucius Volusii**: Mommsen suggests *Quinti Mucii auditoris Volcatii auditor*, *i.e.* Aul. Cascellius, the pupil of Volcatius, who was in turn a pupil of Q. Mucius. The change to *Volcatii* is based on Plin. *N. H.* 8, 40, 144; *Volcatium, qui Cascellium ius civile docuit.*

6. **peritior**: sc. *iuris*. — C. Trebatius Testa was the friend of Cicero and was the celebrated jurist under Augustus, whom Horace represents as a speaker in *Sat.* 2, 1. Cicero addressed seventeen letters to him (*ad Fam.* Book 7).

13. **nec obtinuit apud Gaium Caesarem**: *he lost his case before*, etc.

19. **sermone antiquo usus affectavit**: for *etiam* read *tamen*. The jurists were distinguished for their purity of language and directness of speech, but Tubero was a representative of the archaistic tendency in opposition to Cicero.

47. Post hunc maximae auctoritatis fuerunt Ateius Capito, qui Ofilium secutus est, et Antistius Labeo, qui omnes hos audivit, institutus est autem a Trebatio. Ex his Ateius consul fuit; Labeo noluit, cum offerretur ei ab Augusto consulatus, quo suffectus fieret, honorem suscipere, sed plurimum studiis operam dedit et totum annum ita diviserat, ut Romae sex mensibus cum studiosis esset, sex mensibus secederet et conscribendis libris operam daret. Itaque reliquit quadringenta volumina, ex quibus plurima inter manus versantur. Hi duo primum veluti diversas sectas fecerunt: nam Ateius Capito in his, quae ei tradita fuerant, perseverabat; Labeo ingenii qualitate et fiducia doctrinae, qui et ceteris operis sapientiae operam dederat, plurima innovare instituit.

48. Et ita Ateio Capitoni Massurius Sabinus successit, Labeoni Nerva, qui adhuc eas dissensiones auxerunt. Hic etiam Nerva Caesari familiarissimus fuit. Massurius Sabinus in equestri ordine fuit et publice primus respondit: posteaque hoc coepit beneficium dari, a Tiberio Caesare hoc tamen illi concessum erat.

2. **Antistius Labeo**: Labeo was the most important jurist of the Augustan age, a most productive writer, whose works were drawn upon by all of his successors of importance. He was a republican and a reformer, whose political views were not in harmony with those of the emperor. Although the scholiasts identify him with the Labeo of Hor. *Sat.* 1, 3, 82, *Labeone insanior*, the view is not tenable. Ateius Capito, classed along with Labeo as the head of the opposite school, was by no means Labeo's equal in ability or renown. No general dividing line between the two schools appears from the extant sources, but diverging views were adhered to in matters of detail (cf. Bremer, *Die Rechtslehrer und Rechtsschulen*, pp. 68 ff.).

17. **Sabinus in equestri ordine fuit et primus respondit**: it is possible that 'fuit et' is an interpolation. Otherwise there is a contradiction in the text, since it states

49. Et, ut obiter sciamus, ante tempora Augusti publice respondendi ius non a principibus dabatur, sed qui fiduciam studiorum suorum habebant, consulentibus respondebant neque responsa utique signata dabant, sed plerumque iudicibus ipsi scribebant, aut testabantur qui illos consulebant. Primus divus Augustus, ut maior iuris auctoritas haberetur, constituit, ut ex auctoritate eius responderent; et ex illo tempore peti hoc pro beneficio coepit. Et ideo optimus princeps Hadrianus, cum ab eo viri praetorii peterent, ut sibi liceret respondere, rescripsit eis hoc non peti, sed praestari solere et ideo, si quis fiduciam sui haberet, delectari se populo ad respondendum se praepararet.

50. Ergo Sabino concessum est a Tiberio Caesare, ut populo responderet; qui in equestri ordine iam grandis natu et fere annorum quinquaginta receptus est. Huic nec amplae facultates fuerunt, sed plurimum a suis auditoribus sustentatus est.

that Sabinus, who was the *first* to receive the privilege of giving authoritative responses (*ius respondendi*) was given this authority by Tiberius, but that the plan was inaugurated by Augustus. Without *fuit et*, the meaning is: Sabinus was the *first knight* to receive the *ius respondendi*, the privilege being accorded him by Tiberius. For the meaning of *ius respondendi* (*ex auctoritate principis*) see Introd. 8.

1. **ante tempora Augusti publice respondendi ius non a principibus dabatur**, etc.: the meaning is that before the time of Augustus, the decisions of the jurists were not officially binding because of any power granted them by the state, nor were they rendered under seal; but afterward, under Augustus, they were binding (*ex auctoritate principis*), because of the privilege delegated the jurists by the emperor; and they were also rendered to the judge under seal.

11. **delectari se populo**, etc.: read with Mommsen, *delectari se, si populo ad respondendum se praestaret*.

16. **a suis auditoribus sustentatus est**: the Roman jurists were as a rule men of wealth, who devoted their talents to their profes-

51. Huic successit Gaius Cassius Longinus, natus ex filia Tuberonis, quae fuit neptis Servii Sulpicii et ideo proavum suum Servium Sulpicium appellat. Hic consul fuit cum Quartino temporibus Tiberii, sed plurimum in civitate auctoritatis habuit eo usque, donec eum Caesar civitate pelleret.

52. Expulsus ab eo in Sardiniam, revocatus a Vespasiano diem suum obit. Nervae successit Proculus. Fuit eodem tempore et Nerva filius, fuit et alius Longinus ex equestri quidem ordine, qui postea ad praeturam usque pervenit. Sed Proculi auctoritas maior fuit, nam etiam plurimum potuit appellatique sunt partim Cassiani, partim Proculiani, quae origo a Capitone et Labeone coeperat.

53. Cassio Caelius Sabinus successit, qui plurimum temporibus Vespasiani potuit, Proculo Pegasus, qui temporibus Vespasiani praefectus urbi fuit, Caelio Sabino Priscus Iavolenus, Pegaso Celsus, patri Celso Celsus filius et

sion for other emoluments than those of a pecuniary character (cf. Ulpian, D. 50, 13, 1, 5, *est quidem res sanctissima civilis sapientia, sed quae pretio nummario non sit aestimanda nec dehonestanda, dum in iudicio honor petitur*). Sabinus is the first instance of a Roman of humble circumstances acquiring great renown as a jurist and finally receiving the *ius respondendi* late in life. His work on the *ius civile*, in three books, formed the basis of extensive commentaries by Pomponius, Ulpian, and Paulus.

3. **Hic consul fuit cum Quartino**: read *cum Surdino*. C. Cassius Longinus and L. Naevius Surdinus were consuls A.D. 30. Longinus is called by later writers Cassius, C. Cassius, and once Gaius noster, but he should not be confused with the famous author of the *Institutes of Civil Law*, known as Gaius, whom Justinian calls 'Gaius noster,' and who flourished a century later than Cassius Longinus.

5. **donec eum Caesar civitate pelleret**: *i.e.* Nero, who banished him to Sardinia, 65 A.D., cf. Tac. *Ann.* 16, 9; Suet. *Nero*, 37.

17. **Celsus filius**: Juventius Celsus (filius) and Salvius Iulianus were two of the most important jurists of the second century and

Priscus Neratius, qui utrique consules fuerunt, Celsus quidem et iterum, Iavoleno Prisco Aburnius Valens et Tuscianus, item Salvius Iulianus.

PRELIMINARY DEFINITIONS

Inst. 1, 1

Iustitia est constans et perpetua voluntas ius suum cuique tribuens. Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.

His generaliter cognitis et incipientibus nobis exponere iura populi Romani ita maxime videntur posse tradi com-

were the heads of the Proculian and Sabinian schools respectively. Iulianus was the author of the *Edictum Perpetuum*, compiled by order of Hadrian (see Introd. 5), and with him Pomponius, having brought his history down to his own day, brings his outline of the Roman jurists to a close.

4. **Iustitia est constans**: these definitions of a preliminary character are given here because they stand at the opening of Justinian's Institutes. No modern law book would begin with a definition of justice, but according to Roman usage, the word *ius* in its broadest sense includes all the commands which men are expected to obey, whether they are the commands of morality or of positive law. *Ius* is the science of the good and just (*ars boni et aequi*). These definitions do not draw the line sharply between law and morality. Natural justice is confused with legal justice. Legal justice is that which is done in conformity with the requirements of positive law, whether the law is good or bad. *Iuris prudentia* is primarily a knowledge of law, but *ius* includes a knowledge of things divine as well as human, since the Roman public law embraced divine as well as human affairs. The most common meanings of *ius* are: law, as used in English, denoting a system of rights and duties which are enforced by remedies; a right, conferred by law and implying a corresponding duty imposed upon another (e.g. *ius itineris*, 'a right of way'); the place where law is administered (e.g. *in ius vocare*, 'to summon to court').

8. **His generaliter cognitis**: 'after these general definitions, at

modissime, si primo levi ac simplici, post deinde diligentissima atque exactissima interpretatione singula tradantur. Alioquin si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneraverimus, duorum alterum aut desertorem studiorum efficiemus aut cum magno labore eius, saepe etiam cum diffidentia, quae plerumque iuvenes avertit, serius ad id perducamus, ad quod leniore via ductus sine magno labore et sine ulla diffidentia maturius perduci potuisset.

Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.

Huius studii duae sunt positiones, publicum et privatum. Publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem pertinet.

Inst. 1, 2, 3 Constat autem ius nostrum aut ex scripto aut ex non scripto.

Inst. 1, 2, 9 Ex non scripto ius venit, quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur.

the very outset of our exposition of the laws of the Roman people, it seems to us that they can be most advantageously,' etc. This passage explains Justinian's purpose in ordering the preparation of the Institutes as an elementary textbook, cf. Introd. 16.

12. **Huius studii duae sunt positiones**: the most comprehensive division of the Roman system is into public and private law. Public law regulated the relations existing between the state and its subjects (including also civil and religious administration), and the public worship (*publicum ius in sacris, in sacerdotibus, in magistratibus consistit*, D. 1, 1, 1, 2). Private law regulated the relations of individual subjects one with another. In the early law of Rome, the line dividing public and private law was not clearly defined, and at all times much that is now regarded as pure criminal law was then a part of the private law (*e.g.* theft, robbery). See text and notes on Obligations *ex Delicto*, p. 232 ff.

17. **Ex non scripto ius venit**: the earliest source of law among

Ulp. fr. 4 Mores sunt tacitus consensus populi longa consuetudine inveteratus.

Iulian. D. 1, 3, 32 De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est: et si qua in re hoc deficeret, tunc quod proximum et consequens ei est; si nec id quidem appareat, tunc ius, quo urbs Roma utitur, servari oportet. Inveterata consuetudo pro lege non immerito custoditur, et hoc est ius quod dicitur moribus constitutum. Nam cum ipsae leges nulla alia ex causa nos teneant, quam quod iudicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes: nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis?

Ulp. D. 1, 3, 34 Cum de consuetudine civitatis vel provinciae confidere quis videtur, primum quidem illud explorandum arbitror, an etiam contradicto aliquando iudicio consuetudo firmata sit.

Hermog. D. 1, 3, 35 Sed et ea, quae longa consuetudine comprobata sunt ac per annos plurimos observata, velut tacita civium conventio non minus quam ea quae scripta sunt iura servantur.

Paul. D. 1, 3, 36 Immo magnae auctoritatis hoc ius habetur, quod in tantum probatum est, ut non fuerit necesse scripto id comprehendere.

the Romans, as among other peoples, was custom, approved by long usage (*quod usus comprobavit*). Later on, unwritten custom (*mos*, *mores*, *usus*, *consuetudo*) was supplemented by conscious legislation (*lex*, *ius scriptum*, cf. *lex duodecim tabularum*, and see Introd. 1 and 4). The Romans used the terms *written* and *unwritten law* in the literal meaning of the words, *i.e.* written law was all that was reduced to writing and was authoritative (e.g. *leges*, *edicta*, *responsa prudentium*, etc.). See also Introd. 1 and 2.

Paul. D. 1, 3, 37

Si de interpretatione legis quaeratur, in primis inspiciendum est quo iure civitas retro in eiusmodi casibus usa fuisset: optima enim est legum interpres consuetudo.

Inst. 1, 2, 3

Scriptum ius est lex, plebiscita, senatus consulta, principum placita, magistratuum edicta, responsa prudentium.

Lex est, quod populus Romanus senatore magistratu interrogante, veluti consule, constituebat. Plebiscitum est, quod plebs plebeio magistratu interrogante, veluti tribuno, constituebat. Plebs autem a populo eo differt, quo species a genere; nam appellatione populi universi cives significantur connumeratis etiam patriciis et senatoribus: plebis autem appellatione sine patriciis et senatoribus ceteri cives significantur. Sed et plebiscita lege Hortensia lata non minus valere quam leges coeperunt. Senatus consultum est, quod senatus iubet atque constituit. Nam cum auctus est populus Romanus in eum modum, ut difficile sit in unum eum convocare legis sanciendae causa, aequum visum est senatum vice populi consuli. Sed et quod principi placuit, legis habet vigorem, cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem concessit. Quodcumque igitur imperator per epistulam constituit vel cognoscens decrevit vel edicto praecepit, legem esse constat: haec sunt, quae constitutiones appellantur. Plane ex his quaedam sunt personales,

8. **magistratu interrogante**: *i.e.* when a senatorial magistrate proposes the bill (*legis rogatio*, cf. notes on *leges tulit*, and on *latam legem*, p. 46).

9. **Plebiscitum**: for further explanation see note on *plebiscita*, p. 50.

16. **Senatus consultum**: see Int. 6 and note on *senatus cons.* p. 51.

20. **quod principi placuit**: see Introd. 7 and 10.

quae nec ad exemplum trahuntur, quoniam non hoc princeps vult; nam quod alicui ob merita indulsit, vel si cui poenam irrogavit, vel si cui sine exemplo subvenit, personam non egreditur. Aliae autem, cum generales sunt, omnes procul dubio tenent. Praetorum quoque edicta non modicam iuris obtinent auctoritatem. Haec etiam ius honorarium solemus appellare, quod qui honores gerunt, id est magistratus, auctoritatem huic iuri dederunt. Proponebant et aediles curules edictum de quibusdam casibus, quod edictum iuris honorarii portio est. Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum erat iura condere. Nam antiquitus institutum erat ut essent qui iura publice interpretarentur, quibus a Caesare ius respondendi datum est, qui iuris consulti appellabantur. Quorum omnium sententiae et opiniones eam auctoritatem tenent, ut iudici recedere a responso eorum non liceat, ut est constitutum.

Gai. 1, 1

Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur; nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis; quod vero naturalis

5. **Praetorum edicta**: see Introd. 5.

19. **quod quisque populus ipse sibi ius constituit**: the text makes the further important distinction between the *ius civile* and the *ius gentium*. The most ancient law of Rome was called *ius civile*, or law peculiar to the Roman state and governing Roman citizens only. As time advanced, this body of law, partly written and partly unwritten, was supplemented and adapted to other requirements by the introduction of new principles drawn from the *ius gentium*, *i.e.* the law which was found to exist among the other peoples with whom the Romans came into business relations. By the agency of the praetorian edict and the scientific interpretation of trained jurists, the formal and rigid laws of the *ius civile* were rendered more flexible and adaptable to new circumstances, so that eventually

ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur.

Gai. 1, 8

Omne ius, quo utimur, vel ad personas pertinet, vel ad res, vel ad actiones. Et prius videamus de personis.

Persons (*De Iure Personarum*)

Hermog. D. 1, 5, 2

Cum hominum causa omne ius constitutum sit, primo de personarum statu dicemus.

what was originally merely the law of a city became a cosmopolitan law of the world.

De Iure Personarum: *persona*, meaning literally the mask worn by an actor and then the rôle in a play, is used metaphorically in law to denote the rôle played by the individual in the different parts of the drama of civic life. The same individual might be endowed with the personality of father, husband, guardian, etc. (*persona patris, mariti, tutoris*). *Persona*, therefore, in legal language, denotes whoever or whatever is the subject of legal rights and duties or is capable of assuming such rights and duties, *i.e.* individuals (but not slaves), corporations, and public bodies. Abstract conceptions clothed by law with legal personality (artificial, juristic, legal persons), the Romans called *corpora, collegia, societates, sodalitates*, etc. Of these, some of the more important were the Populus Romanus, the imperial treasury (*fiscus*), industrial guilds (*collegia opificum*), societies for the burial of the poor (*collegia tenuiorum*), mining and tax-gathering companies (*societates aurifodinarum, argentifodinarum, salinarum, vectigalium publicorum*), social and political clubs (*sodalitates*), etc.

10. **de personarum statu**: *status* is the technical term denoting the civil position of the individual as a legal person. The three elements of status, each of which was called *caput*, were liberty (*libertas*), citizenship (*civitas*), and membership in a family (*familia*). In the person of a *civis Romanus* these three elements were united.

Paul. D. 1, 5, 7 Qui in utero est, perinde ac si in rebus humanis esset custoditur, quotiens de commodis ipsius partus quaeritur; quamquam alii antequam nascatur nequaquam prosit.

Paul. D. 5, 4, 3 Antiqui libero ventri ita prospexerunt, ut in tempus nascendi omnia ei iura integra reservarent; sicut apparet in iure hereditatium.

Paul. D. 1, 5, 14 Non sunt liberi, qui contra formam humani generis converso more procreantur: veluti si mulier monstrosum aliquid aut prodigiosum enixa sit. Partus autem, qui membrorum humanorum officia ampliavit, aliquatenus videtur effectus et ideo inter liberos connumerabitur.

Ulp. D. 50, 16, 135 Quaeret aliquis, si portentosum vel monstrosum vel debilem mulier ediderit vel qualem visu

1. **Qui in utero est**: inasmuch as legal rights are created for the benefit of man, the limits of his personality are determined by the points where such rights begin and cease to be useful by the operation of nature, namely, at birth and death. Birth is the complete separation from its mother of a child born alive (*partus antequam edatur, mulieris portio est vel viscerum*, D. 25, 4, 1, 1). By exception, however, in the matter of inheritance, according to a law of the Twelve Tables, a child already conceived but still unborn is regarded as possessed of legal rights, if it come into the world alive, being reckoned among the heirs as if already born (*nasciturus pro iam nato habetur quando de eius commodo agitur*). Otherwise the unborn child was without legal significance, and during the republic, therefore, abortion in the case of a married woman was not punishable. — **in rebus humanis**: 'as if already born alive.'

4. **prosit**: sc. *qui in utero est* as subject.

5. **libero ventri**: 'for a child free at its birth.' *Venter* often means, in legal Latin, the child in embryo. As the status of the child depends upon the status of the father, if born from a *iustum matrimonium*, and of its mother, if born *extra matrimonium*, the privilege stated in the text is extended to that embryo only which will be free at the time of its birth.

9. **converso more**: 'in an unnatural manner.'

vel vagitu novum, non humanae figurae, sed alterius, magis animalis quam hominis, partum, an, quia enixa est, prodesse ei debeat. Et magis est, ut haec quoque parentibus prosint: nec enim est quod eis imputetur, quae qualiter potuerunt, statutis obtemperaverunt, neque id quod fataliter accessit, matri damnum iniungere debet.

Freemen and Slaves

Inst. 1, 3

Summa itaque divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi. Et libertas quidem est, ex qua etiam liberi vocantur, naturalis facultas eius quod cuique facere libet,

2. **prodesse**: it was the policy of Roman legislation to encourage marriage. As early as the *lex Cincia*, 204 B.C., which placed a limit to the giving of gifts and rewards, exception was made in favor of gifts made to family relations for the purpose of providing a *dos*. Augustus sought to encourage marriage and the rearing of children, and to discourage celibacy and childlessness, by the *lex Iulia* (4 A.D.) and the *lex Papia Poppaea* (9 A.D.). Among other provisions of these laws, the freeborn mother of three children and the freedwoman mother of four children (*ius trium vel quattuor liberorum*) were relieved of certain disabilities and received several advantages in the rights of inheritance. According to the Twelve Tables, creatures *contra formam humani generis* (*portenta*, *monstra*, *prodigia*) and cripples (*debiles*) were to be put to death, though they sufficed for the avoidance of the penalties for childlessness imposed by the *lex Iulia et Papia Poppaea*.

Freemen and Slaves: according to the Roman law, not all human beings are persons. Personality presumes a free condition. Slaves are, therefore, not persons but things. They are not protected by the law as its subjects, but by their masters as property. They are without rights and have no legal capacity (*servus nullum caput habet*, cf. Inst. 1, 16, 4). However, since the slave is possessed of reason and is physically capable of acquiring rights (therein differing from other animals), he is sometimes loosely spoken of as *persona*. The slave was answerable for his crimes and, though his contracts

nisi si quid aut vi aut iure prohibetur. Servitus autem est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur. Servi autem ex eo appellati sunt, quod imperatores captivos vendere iubent ac per hoc servare nec occidere solent. Qui etiam mancipia dicti sunt, quod ab hostibus manu capiuntur. Servi autem aut nascuntur aut fiunt. Nascuntur ex ancillis nostris: fiunt aut iure gentium, id est ex captivitate, aut iure civili, cum homo liber maior viginti annis ad pretium participandum sese venumdari passus est. In servorum condicione nulla differentia est. In liberis multae differentiae sunt. Aut enim ingenui sunt aut libertini.

had no legal significance under the *ius civile*, they nevertheless created natural obligations which were binding if the slave attained his freedom (*servi ex delictis obligantur; ex contractibus autem civiliter non obligantur, sed naturaliter et obligantur et obligant*, D. 44, 7, 14).

1. **Servitus constitutio iuris gentium**: according to the Roman view, all men are by nature free. Slavery was found to exist, however, among the various tribes and nations with which the Romans came in contact and was therefore looked upon as an institution of the *ius gentium* (cf. Inst. 1, 2, 1). But as regards the institution of slavery, this *ius gentium* was found to be in conflict with the law of nature, since slavery existed among all peoples. Owing to this lack of harmony between the theory of the natural freedom of all men and actual practice, the policy of the law was constantly in favor of liberty (*favore libertatis*), tending to ameliorate the condition of slaves by protecting them against cruelty and facilitating the acquisition of freedom by various forms of manumission. Cf. note on *Freedom*, p. 100.

8. **iure civili**: a freeman by collusion with a pretended master might fraudulently allow himself to be sold as a slave to an innocent purchaser. Inasmuch as liberty was an inalienable right, after the purchaser had paid the price, the one sold could set up a claim for his freedom and, except for the provision whereby the pretended slave was to be taken at his word, could have gained his release and have succeeded in the fraud. Slavery as a penalty was one of the worst forms of civil death. A freeman might become

Freeborn (*Ingenui*)

Gai. 1, 11

Ingenui sunt qui liberi nati sunt; libertini, qui ex iusta servitute manumissi sunt.

Inst. 1, 4

Ingenuus is est, qui statim ut natus est liber est, sive ex duobus ingenuis matrimonio editus, sive ex libertinis, sive ex altero libertino, altero ingenuo. Sed et si quis ex matre libera nascatur, patre servo, inge-

a slave in other ways, *e.g. qui cum liber esset, censeri noluerit* could be sold *trans Tiberim* (Cic. *pro Caec.* 34, 99); *qui ad dilectum olim non respondebat* (D. 49, 16, 4, 10); one who was a delinquent debtor (*nexus*) at the hands of his creditor (Twelve Tables, III); one sentenced to death or to work in the mines (*servus poenae*, Inst. 1, 12, 3); a freedman who displayed ingratitude toward his former master (*revocatio in servitutem*).

Ingenui: men as regards their legal position are divided into *liberi* and *servi*. *Liberi* are further divided into freeborn (*ingenui*) and freedmen (*libertini*) on the one hand; and into *cives*, *Latini*, and *peregrini*, on the other hand. *Cives* are further subdivided into *personae sui iuris* and *personae alieni iuris*. Status or *condicio* of the individual is determined by birth. A child born from a marriage which conforms to the requirements of the *ius civile* (*matrimonium legitimum* or *iustum*), follows the status of the father; born from a marriage of the *ius gentium* (*sine legitimo matrimonio*) or out of wedlock, the child follows the condition of the mother, *conubio interveniente liberi semper patrem sequuntur, non interveniente conubio matris condicioni accedunt*, Ulp. 5, 8; *qui illegitime concipiuntur, statum sumunt ex eo tempore quo nascuntur*, Gai. 1, 89, though cf. note on *ex matre*, p. 82.

1. Ingenui sunt qui liberi nati sunt: an *ingenuus* is one who has not only been born free, but who has always continued to be free.

2. ex iusta servitute: *iusta* means *legitima*, that which is according to law, hence *iusta servitus* is the actual condition of slavery, in law as well as in fact, a condition which must not have arisen through error in fact in supposing one was a *servus* when in reality he was an *ingenuus*. Manumission of one merely *supposed* to be a slave did not prejudice birth (*veritati et origini ingenuitatis manumissio quocumque modo facta non praeiudicat*, Paul. 5, 1, 2).

nuus nihilo minus nascitur; quemadmodum qui ex matre libera et incerto patre natus est, quoniam vulgo conceptus est.

Cum autem ingenuus aliquis natus sit, non officit illi in servitute fuisse et postea manumissum esse, saepissime enim constitutum est natalibus non officere manumissionem.

Ulp. D. 40, 10, 6

Libertinus si ius anulorum impetraverit, quamvis iura ingenuitatis salvo iure patroni nactus sit, tamen ingenuus intellegitur: et hoc divus Hadrianus rescripsit.

Ulp. D. 38, 2, 3

Etiamsi ius anulorum consecutus sit libertus a principe, adversus huius tabulas venit pa-

Cf. note on *non officit*, below. Those returning from captivity (*servi ex captivitate*) recover their former status *iure postliminii* (see note on *postliminium*, p. 85), and are, therefore, *ipso facto* neither *libertini* nor *servi*.

1. **ex matre libera**: in general, the child follows the status of the mother at the moment of birth. The jurists modified this principle *favore libertatis*, so that the child was born free if its mother had been free at any time during gestation, even though she was enslaved when the child was born, D. 1, 5, 5, 2–3.

3. **non officit in servitute fuisse**: *i.e.* 'it does not prejudice his status to have been in the position of a slave' and afterward to have been manumitted. Such a one is still *ingenuus*, not *libertinus* (cf. note on *ex iusta*, p. 81). 'In servitute esse' means to be in the position of a slave *de facto*, while 'servus esse' means to be a slave *de iure*, *e.g.* a freeborn child, stolen and sold as a slave, is *in servitute*, but if it fall into the hands of a master who manumits it, the child is not *libertinus*, but *ingenuus de iure*. The theory in this case is that blood is not vitiated by a servile condition.

6. **Libertinus si ius anulorum impetraverit**: freedmen (*libertini*) may attain the status of freeborn citizens (*ingenui*) in two ways: (*a*) by acquiring the right to wear the gold ring (*ius aureorum anulorum*), in which case, the right of patron over his freedmen remained unimpaired (*salvo iure patroni*); (*b*) by a kind of legal regeneration (*natalium restitutio*) with a suspension of the patron's rights (*restituitur quantum ad ius totum pertinet*). Justinian extended these privileges to all freedmen, who then acquired full rights of freeborn citizens without limitations.

tronus, ut multis rescriptis continetur: hic enim vivit quasi ingenuus, moritur quasi libertus.

Marcian. D. 40, 11, 2

Interdum et servi nati ex post facto iuris interventu ingenui fiunt, ut ecce si libertinus a principe natalibus suis restitutus fuerit. Illis enim utique natalibus restituitur, in quibus initio omnes homines fuerunt, non in quibus ipse nascitur, cum servus natus esset. Hic enim, quantum ad totum ius pertinet, perinde habetur atque si ingenuus natus esset, nec patronus eius potest ad successionem venire. Ideoque imperatores non facile solent quemquam natalibus restituere nisi consentiente patrono.

Slaves

Ulp. D. 50, 17, 32

Quod attinet ad ius civile, servi pro nullis habentur; non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt.

Gai. 1, 82

Ex ancilla et libero iure gentium servus nascitur, et contra ex libera et servo liber nascitur.

13. Quod attinet ad ius civile: ancient law does not recognize all men as subjects of legal rights. Only members of each people's community or state are protected by the laws of that community or state (*quod quisque populus ipse sibi ius constituit, id ipsius proprium civitatis est vocaturque ius civile, quasi ius proprium ipsius civitatis*, Inst. 1, 2, 1). Strangers are unprotected and are looked upon as lawful prey to be seized and thrown into servitude as the property of their captors (*quod ex nostro ad eos*, i.e. *hostes*, *pervenit, illorum fit, et liber homo noster ab eis captus servus fit eorum*, D. 49, 15, 5, 2). In Roman law, a slave is a thing, classed along with beasts of burden, and, like them, he is at the absolute disposition of his master (*mancipi res sunt servi et quadrupedes*, Ulp. 19, 1; *servile caput nullum ius habet*, D. 4, 5, 3, 1), who has over his slave the power of life and death (*vitae necisque potestas*) and domestic chastisement. For the limitation of these rights under the empire see note on *Freedom*, p. 100.

Ulp. 5, 8

Conubio interveniente liberi semper patrem sequuntur; non interveniente conubio matris condicioni accedunt, excepto eo qui ex peregrino et cive Romana peregrinus nascitur, quoniam lex Minicia ex alterutro peregrino natum deterioris parentis condicionem sequi iubet. Ex cive Romano et Latina Lătinus nascitur et ex libero et ancilla servus, quoniam, cum his casibus conubia non sint, partus sequitur matrem.

Slavery arising from Captivity

Ulp. D. 49, 15, 24

Hostes sunt, quibus bellum publice populus Romanus decrevit vel ipsi populo Romano; ceteri

1. **Conubio interveniente**: the *ius conubii* is the right to conclude a marriage valid according to the requirements of the *ius civile* (*matrimonium iustum*, *legitimum*, *ex iure Quiritium*), conferring *patria potestas* and other rights growing out of the organization of the family. *Latini* and *peregrini* had the *conubium* only when obtained by special grant (*conubium est uxoris iure ducendae facultas. Conubium habent cives Romani cum civibus Romanis; cum Latinis et peregrinis ita, si concessum sit. Cum servis nullum est conubium*, Ulp. 5, 3; *Veteranis quibusdam concedi solet principalibus constitutionibus conubium cum his Latinis peregrinisve, quas primas post missionem uxores duxerint*, Gai. 1, 57). Cf. notes on *iustum* and *iustas*, p. 111.

Slavery arising from Captivity: as has been stated in the text, slavery arises from birth or from other circumstances recognized by the *ius gentium* and the *ius civile*. By the *ius gentium*, slavery arises from captivity, but the one returning from captivity regains his former status and his legal rights as they existed at the moment of his capture (*postliminium habet*, i.e. *omnia restituuntur ei iura, ac si captus ab hostibus non esset*). One dying in captivity was held to have died a free man, and, by a fiction of law (*fictio legis Corneliae*, important in the matter of inheritance), to have died at the moment of capture (*in omnibus partibus iuris is, qui reversus non est ab hostibus, quasi tunc decessisse videtur, cum captus est*, D. 49, 15, 18). The most common ways in which slavery may arise by the *ius civile* have been mentioned above. Cf. note on *iure*, p. 80.

9. **Hostes sunt**: although the

latrunculi vel praedones appellantur. Et ideo qui a latronibus captus est, servus latronum non est, nec postliminium illi necessarium est; ab hostibus autem captus, ut puta a Germanis et Parthis, et servus est hostium et postliminio statum pristinum recuperat.

Pompon. D. 49, 15, 5

Postliminii ius competit aut in bello aut in pace. In bello, cum hi, qui nobis hostes sunt, aliquem ex nostris ceperunt et intra praesidia sua perduxerunt: nam si eodem bello is reversus fuerit, postliminium habet, id est perinde omnia restituuntur ei iura, ac si captus ab hostibus non esset. Antequam in praesidia perducatur hostium, manet civis. Tunc autem reversus intellegitur, si aut ad amicos nostros perveniat aut intra praesidia nostra esse coepit. In pace quoque postliminium datum

stranger was not protected by the laws of Rome originally, unless he enjoyed the rights of hospitality (*hospitium publicum vel privatum*), or was protected by treaty with his people, and might, therefore, be seized as a slave, it was necessary, in order that the *ius postliminii* should operate and that slavery should arise *ex captivitate*, that the captive should be taken by a formal enemy, *i.e.* one against whom the Roman people had formally declared war or *vice versa* (*hostes hi sunt, qui nobis aut quibus nos publice bellum decrevimus*).

9. **postliminium**: this term is used subjectively and objectively. It is either the recovery of rights by a person who has been reduced to slavery by capture in war, or it is the recovery of rights over a person or thing restored from the possession of an enemy (*cum duae species postliminii sint, ut aut nos revertamur aut aliquid recipiamus*, D. 49, 15, 14). The derivation of the word, discussed by Cic. *Top.* 8, is retained by Justinian, Inst. 1, 12, 5: *dictum est autem postliminium a limine et post, ut cum, qui ab hostibus captus in fines nostros postea pervenit, postliminio reversum recte dicimus. Nam limina sicut in domibus finem quendam faciunt, sic et imperii finem limen esse veteres voluerunt. Hinc et limes dictus est quasi finis quidam et terminus. Ab eo postliminium dictum, quia eodem limine revertebatur, quo amissus erat.* Deserters and those surrendering to the enemy in

est: nam si cum gente aliqua neque amicitiam neque hospitium neque foedus amicitiae causa factum habemus, hi hostes quidem non sunt, quod autem ex nostro ad eos pervenit, illorum fit, et liber homo noster ab eis captus servus fit et eorum; idemque est, si ab illis ad nos aliquid perveniat. Hoc quoque igitur casu postliminium datum est. Captivus autem si a nobis manumissus fuerit et pervenerit ad suos, ita demum postliminio reversus intellegitur, si malit eos sequi quam in nostra civitate manere. Et ideo in Atilio Regulo, quem Carthaginienses Romam miserunt, responsum est non esse eum postliminio reversum, quia iuraverat Carthaginem reversurum et non habuerat animum Romae remanendi. Et ideo in quodam interprete Menandro, qui posteaquam apud nos manumissus erat, missus est ad suos, non est visa necessaria lex, quae lata est de illo, ut maneret civis Romanus: nam sive animus ei fuisset remanendi apud suos, desineret esse civis, sive animus fuisset revertendi, maneret civis, et ideo esset lex supervacua.

Tryphon. D. 49, 15, 12

In bello postliminium est, in pace autem his, qui bello capti erant, de quibus nihil in pactis

battle with their weapons in their hands did not enjoy the privileges of the *ius postliminii*.

11. **responsum est**: *it was decided, i.e.* by the court. *Responsa* of the jurisconsults were not authoritative at this time, cf. Intr. 8.

16. **animus remanendi**: the manner of a captive's return was immaterial, provided he return with the intention of remaining and had not promised to go back to the enemy (*nihil interest, quomodo captivus reversus est, utrum dimissus an vi vel fallacia potestatem hostium evaserit, ita tamen, si ea mente venerit, ut non illo reverteretur: nec enim satis est corpore domum quem redisse, si mente alienus est*, D. 49, 15, 26).

21. **in pactis erat comprehensum**: 'regarding whom no provisions had been made in the treaties.'

erat comprehensum. Quod ideo placuisse Servius scribit, quia spem revertendi civibus in virtute bellica magis quam in pace Romani esse voluerunt. Verum in pace qui pervenerunt ad alteros, si bellum subito exarsisset, eorum servi efficiuntur, apud quos iam hostes suo facto deprehenduntur. Quibus ius postliminii est tam in bello quam in pace, nisi foedere cautum fuerat, ne esset his ius postliminii.

Pompon. D. 50, 7, 18

Si quis legatum hostium pulsasset, contra ius gentium id commissum esse existimatur, quia sancti habentur legati. Et ideo si, cum legati apud nos essent gentis alicuius, bellum cum eis indictum sit, responsum est liberos eos manere: id enim iuri gentium convenit esse. Itaque eum, qui legatum pulsasset, Quintus Mucius dedi hostibus, quorum erant legati, solitus est respondere. Quem hostes si non recepissent, quaesitum est, an civis Romanus maneret: quibusdam existimantibus manere, aliis contra, quia quem semel populus iussisset dedi, ex civitate expulsisse videretur, sicut faceret, cum aqua et igni interdiceret. In qua sententia videtur Publius Mucius fuisse. Id autem maxime quaesitum est in Hostilio Mancino, quem Numantini sibi deditum non acceperunt; de

1. **placuisse Servius scribit**, etc.: 'that this was so ordained because the Romans wanted citizens to base their hope of return more on bravery in war than on an expectation of peace.' Servius Sulpicius Rufus, the friend of Cicero, is meant. Cf. D. 1, 2, 2, 43 above, text p. 66.

9. **Si quis legatum pulsasset**: among the ways in which slavery may arise *iure civili*, is the surrender of the guilty one to an enemy whose ambassadors have been violated.

21. **Hostilio Mancino**: Hostilius Mancinus, after he had been defeated by the Numantines during his consulship, 137 B.C., succeeded in making a peace with them which failed to gain the approval of the senate, and he was consequently ordered to return to the enemy. A *lex* was afterward

quo tamen lex postea lata est ut esset civis Romanus, et praeturam quoque gessisse dicitur.

Manumission

Ulp. D. 1, 1, 4

Manumissiones quoque iuris gentium sunt. Est autem manumissio de manu missio, id est datio libertatis: nam quamdiu quis in servitute est, manui et potestati suppositus est, manumissus liberatur potestate. Quae res a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita; sed posteaquam iure gentium servitus invasit, secutum est beneficium manumis-

passed in his favor (Vel. Paterc. 2, 1), though the *causa Mancini* became an important instance of *deditio ad hostem*, referred to several times by Cicero (*de Or.* 1, 40; *de Off.* 3, 30; *Top.* 8).

Manumission: a servus differed from other things (*res*) in that he was capable of obtaining his freedom by manumission, acquiring thereby personality and legal capacity for himself. As a master could not confer more right than he himself possessed, a manumitted slave became *civis* only when his master was a Roman citizen. There were degrees in the status of a manumitted slave, according as the legal requirements for manumission were totally or only partially fulfilled. Complete manumission required (*a*) that the master have complete ownership (*dominium*) of his slave *ex iure Quiritium*; (*b*) that the manumission occur in one of the ways prescribed by law (*manumissio iusta ac legitima*), e.g. *vindicta*, *censu*, *testamento*, etc.; (*c*) that it conform to the restrictions upon manumissions imposed by law (*e.g.* by the *lex Aelia Sentia*). In certain cases a slave might obtain his liberty without manumission. See D. 40, 8, and note on *Freedom*, p. 100.

4. **de manu missio**: *manus* denotes the power of a *paterfamilias* over his slaves and children, but the word is usually employed more specifically of the power of husband over his wife (*manus mariti*). The master (*dominus*) has *dominium* over his slave as a part of his property; he also has *potestas* over his slave (like that over his son) as a passive member of his household; hence the power of the

sionis. Et cum uno naturali nomine homines appellaremur, iure gentium tria genera esse coeperunt: liberi et his contrarium servi et tertium genus liberti, id est hi qui desierant esse servi.

5 Ulp. 1, 5 Libertorum genera sunt tria, cives Romani, Latini Iuniani, dediticiorum numero.

master over his slave is usually called *dominica potestas*; that of father over his children, *patria potestas*; that of husband over his wife, *manus*.

3. **liberti**: *liberti* is here used for *libertini*. The usual distinction between *libertus* and *libertinus* is that the former is concrete, denoting a certain freedman with reference to his patron, whose name usually follows in the gen. case; while the latter is abstract, denoting the freedman class as contrasted with the freeborn (*e.g. libertinum quidem se confiteri, libertum autem Seii se negare*).

5. **Libertorum genera sunt tria**: other modes of manumission than those called *legitima*, though void *iure civili*, were recognized by custom, by the praetorian law, and by imperial constitutions. Slaves manumitted by one of these modes were placed in a position inferior to citizenship, as that of *Latini* or *dediticii*. By the *lex Aelia Sentia* (4 A.D.) it was further required, in order to make a complete manumission which conferred citizenship, that the slave be thirty years of age. By the *lex Iunia Norbana* (about 19 A.D.), those whose manumission was defective, but who enjoyed the protection of the praetor as freedmen, were given, instead of complete civitas, the rights of *Latini Iuniani*, *i.e.* of all the public and private rights, they received the *ius commercii* only. The *Latinus Iunianus* could not make a Roman will nor inherit under a will; at death, his property fell to his *manumissor* as if he were still a slave. Owing to the criminal character of great numbers of manumitted slaves, the *lex Aelia Sentia* provided that slaves convicted of crime, who had been put in chains, tortured, or branded, should after manumission be in the position of those who had surrendered to an enemy (*dediticii*). Among other disabilities, *dediticii* could not live within one hundred miles of the City, could never become *cives*, and at death forfeited all their property to their *manumissor*. The distinction between freedmen as *cives*, *Latini*, and *dediticii* was not abolished until the time of Justinian, under whose legislation, however, a slave became wholly free by any act of

Ulp. 1, 7 Vindicta manumittuntur apud magistratum populi Romani, velut consulem praetoremve vel proconsulem.

Gai. D. 40, 2, 7 Non est omnino necesse pro tribunali manumittere: itaque plerumque in transitu servi manumitti solent, cum aut lavandi aut gestandi aut ludorum gratia prodierit praetor aut proconsul legatusve Caesaris.

Hermog. D. 40, 2, 23 Manumissio per lictores hodie domino tacente expediri solet, et verba sollemnia licet non dicantur, ut dicta accipiuntur.

his master intended to grant freedom.

1. **Vindicta manumittuntur:** *manumissio* was an act of both private and public significance. As a private act, in freeing a slave from the ownership of his master, it deprived the master of a part of his property; as a public act, it was significant because it conferred personality and citizenship upon one who had formerly no part in the state. Under the old law of the republic, therefore, manumission was not a matter of private interest only, accomplished by the mere will of the *dominus*, but a transaction in which the state intervened, as is shown by the oldest forms of this institution. Manumission by *vindicta* was a fictitious suit (*causa liberalis*), brought before a magistrate. The *vindicta* (or *festuca*) was a staff representing the ancient *hasta* as a symbol of ownership. A friend of the slave (*assertor libertatis*), in later times a lictor of the praetor often acting in this capacity, touched the slave with the staff, at the same time asserting his freedom. The master, releasing his hold on the slave (*manu mittens*), indicated his acquiescence in the claim. The magistrate, representing the authority of the state, then declared the slave to be free. For an account of this procedure in the sources, see Gai. 4, 16. This act of manumission might be performed wherever the praetor could be found (*i.e. de plano*, 'on the level ground') and did not require his presence in formal court (*pro tribunali*, 'on his elevated platform').

8. **Manumissio per lictores:** the definite requirements of the fictitious suit by *vindicta* passed away in time and the appearance of an *assertor*, even though he were represented in the person of a lictor, was unnecessary. The only requirement then remaining was the

Ulp. D. 40, 2, 8

Ego cum in villa cum praetore fuissem, passus sum apud eum manumitti, etsi lictoris praesentia non esset.

Ulp. 1, 8

Censu manumittebantur olim, qui lustrali censu Romae iusso dominorum inter cives Romanos censum profitebantur.

Fr. Dosith. 17

Census autem Romae agi solet et peracto censu lustrum conditur; est autem lustrum quinquennale tempus, quo Roma lustratur. Sed debet hic servus ex iure Quiritium manumissoris esse, ut civis Romanus fiat. Magna autem dissensio est inter peritos, utrum eo tempore vires accipiant omnia, quo in censu aguntur, an eo tempore quo lustrum conditur. Sunt enim qui existimant non alias vires accipere quae in censu aguntur, nisi haec dies sequatur, qua lustrum conditur; existimant enim censum descendere ad diem lustri, non lustrum recurrere ad diem census. Quod ideo quaesitum est, quoniam omnia quae in censu aguntur lustro confirmantur.

Marcian. D. 40, 4, 23

Testamento manumissus ita demum fit liber, si testamentum valeat et ex eo adita sit hereditas, vel si quis omissa causa testamenti ab intestato possideat

declaration of freedom by the magistrate in the presence of the slave manumitted.

4. **Censu manumittebantur**: manumission *censu* was completed under magisterial supervision by inserting the name of the slave to be manumitted in the list of citizens with his master's approval. Here the state was represented by the censor and the act was legalized by the *lustrum conditum*, celebrated at the conclusion of the lustral period. This form of manumission disappeared (*olim*) with the abolition of the census, the last *lustrum* having occurred under Vespasian, 74 A.D. (Censorin. *de Die Nat.* 18). It was a disputed point with the jurists of the republic, whether the manumission was valid from the beginning or only at the end of the lustral period.

19. **Testamento manumissus**: manumissions by last will were valid

hereditatem. Testamento data libertas competit pure quidem data statim, quam adita fuerit hereditas vel ab uno ex heredibus; si in diem autem libertas data est vel sub condicione, tunc competit libertas, cum dies venerit vel condicio extiterit.

Gai. 2, 267

Qui directo testamento liber esse iubetur, velut hoc modo: 'Stichus servus meus liber esto,' vel hoc: 'Stichum servum meum liberum esse iubeo,' is ipsius testatoris fit libertus. Nec alius ullus directo ex testamento libertatem habere potest, quam qui utroque tempore testatoris ex iure Quiritium fuerit, et quo faceret testamentum et quo moreretur.

Ulp. D. 40, 4, 30

Si servi, qui apud hostes sunt liberi esse iussi sunt, ad libertatem perveniunt, quamvis neque testamenti neque mortis tempore testantis, sed hostium fuerunt.

in the same way that other testamentary dispositions were valid. Though the execution of a will was a private act, it was theoretically an act in which the state was interested, as the history of the Roman testament shows (cf. *testamentum calatis comitiis*, requiring the coöperation of the popular assembly with the testator). Owing to this fact, *manumissio testamento* was classed along with the forms already mentioned as *iusta ac legitima*. Direct manumission, bequeathed by the testator as a legacy to his slave (*manumissio testamento directa*), is to be distinguished from the testamentary injunction to the heir to effect the manumission of the slave (*manumissio fideicommissaria*). In the former case, the slave was called *orcinus*, because his patron was already deceased when liberty was acquired; see also note on *non testatoris*, p. 93.

1. **pure data statim, quam**: 'when granted unconditionally, is acquired just as soon as.'

3. **in diem vel sub condicione**: it was a common practice to make the *manumissio directa* operate from a stated time or depend on the fulfillment of a condition. In either case, the slave remains *ad interim* slave of the heir and is called *statuliber*. When the provision has been satisfied, he gains

Ulp. 2, 7

Libertas et directo potest dari hoc modo: 'liber esto,' 'liber sit,' 'liberum esse iubeo,' et per fideicommissum, ut puta: 'rogo, fidei committo heredis mei, ut Stichum servum manumittat.' Is, qui directo liber esse iussus est, orcinus fit libertus: is autem, cui per fideicommissum data est libertas, non testatoris sed manumissoris fit libertus.

Inst. 1, 5, 1

Multis autem modis manumissio procedit: aut enim ex sacris constitutionibus in sacrosanctis ecclesiis aut vindicta aut inter amicos aut per epistulam aut per testamentum aut aliam quamlibet ultimam voluntatem. Sed et aliis multis modis libertas servo competere potest, qui tam ex veteribus quam nostris constitutionibus introducti sunt. Servi vero a dominis semper manumitti solent;

his liberty *ipso iure* (*statuliber est, qui statutam et destinatam in tempus vel condicionem libertatem habet*, D. 40, 7, 1; *statuliber, quamdiu pendet condicio, servus heredis est*, Ulp. 2, 2).

6. **non testatoris sed manumissoris fit libertus**: the importance of the distinction between *manumissio directa* and *fideicommissaria* appears in the rights of patrons over their freedmen and the duties of freedmen to their patrons (cf. note on *Relation*, p. 102). Properly *manumissio per fideicommissum* is no manumission at all: it is only a direction to the heir to manumit, hence the *manumissio* does not occur *testamento*, but is to be effected by the heir in some one of the regular ways, *e.g. vindicta, censu*, etc.

9. **in sacrosanctis ecclesiis**: a new form of complete manumission was added by Constantine, whereby a declaration of freedom was made by the master in the sacred edifice before the bishop. In the time of Justinian every oral or written declaration of freedom acknowledged by five witnesses and numerous informal modes of manumitting were valid, *e.g.* by the master's writing or subscribing a letter to his slave giving him his freedom (*per epistulam*); by declaration among friends (*inter amicos*); by the slave's attending his master's funeral wearing the hat of freedom (*pileatus*) or by an invitation to his master's table (*per mensam*), etc.

11. **aliam quamlibet ultimam voluntatem**: *e.g. per codicillos, i.e.*

adeo ut vel in transitu manumittantur, veluti cum praetor aut proconsul aut praeses in balneum vel in theatrum eat.

Constan. C. Th. 4, 7

Qui religiosa mente in ecclesiae gremio servulis suis meritam concesserint libertatem, eandem eodem iure donasse videantur, quo civitas Romana solemnitatibus decursis dari consuevit. Sed hoc dumtaxat eis, qui sub adspectu antistitum dederint, placuit relaxari.

Just. C. 7, 6, 1

Sancimus, si quis per epistulam servum suum in libertatem producere maluerit, licere ei hoc facere quinque testibus adhibitis, qui post eius litteras sive in subscriptione positas sive per totum textum effusas suas litteras supponentes fidem perpetuam possint chartulae praebere. Et si hoc fecerit, sive per se scribendo sive per tabularium, libertas servo competat quasi ex imitatione codicilli delata, ita tamen, ut et ipso patrono vivent et libertatem et civitatem habeat Romanam. Sed et si quis inter amicos libertatem dare suo servo maluerit, licebit ei quinque similiter testibus adhibitis suam explanare voluntatem et quod liberum eum esse voluit dicere; et hoc sive inter acta fuerit testificatus sive testium voces attestationem sunt amplexae et litteras tam publicarum personarum quam testium habeant, simili modo servi ad civitatem producantur Romanam quasi ex codicillis similiter libertatem adipiscentes.

an informal will, requiring fewer solemnities than a *testamentum* and not meaning, as in the English use of the term *codicil*, a supplementary will.

11. **per totum textum**: the writer might affix his signature simply or write the entire text with his own hand. In the latter case, his signature was unnecessary, but the witnesses must sign in either case at the bottom (*post eius litteras*).

19. **inter acta testificatus sive testium voces**: 'he may either make a declaration of this alone before a magistrate or the statements of the attesting witnesses may prove it and these should have the signatures of,' etc.

Manumission Restricted

Gai. 1, 13

Lege itaque Aelia Sentia cavetur, ut qui servi a dominis poenae nomine vincti sint, quibusve stigmata inscripta sint, deve quibus ob noxam quaestio tormentis habita sit et in ea noxa fuisse convicti sint, quive ut ferro aut cum bestiis depugnarent traditi sint, inve ludum custodiamve coniecti fuerint, et postea vel ab eodem domino vel ab alio manumissi, eiusdem condicionis liberi fiant, cuius condicionis sunt peregrini dediticii.

Vocantur autem peregrini dediticii hi, qui quondam adversus populum Romanum armis susceptis pugnaverunt, deinde victi se dediderunt.

Manumission Restricted: toward the end of the republic the number of slaves set free increased to such an extent that the public welfare was menaced. As a result of foreign conquest, slaves in great numbers were imported into the City from all directions, but especially from the conquests in the East, constituting for the most part a vicious and dangerous class. It was also true that manumission was not always a reward for good conduct and faithful service. It was, on the contrary, often a means of disposing of undesirable property. Special laws were enacted to check the clothing of these disreputable and criminal classes with Roman citizenship (*e.g.* the *lex Aelia Sentia* and the *lex Fufia Caninia*). According to the *lex Aelia Sentia*, criminal slaves could attain only partial liberty (*dediticia libertas*); could not live within one hundred miles of Rome; and could never attain citizenship. This law was passed under Augustus (4 A.D.) and received its name from the two consuls for the year, Sextus Aelius Catus and Gaius Sentius Saturninus (Suet. *Aug.* 40, *magni praeterea existimans, sincerum atque ab omni colluvione peregrini ac servilis sanguinis incorruptum servare populum, et civitatem Romanam parcissime dedit et manumittendi modum terminavit*).

8. **peregrini dediticii**: the conquered peoples became slaves of the Roman state, but were not always sold as slaves, inasmuch as the imperator or senate gave them provisional freedom until their final disposition was determined

Huius ergo turpitudinis servos quocumque modo et cuiuscumque aetatis manumissos, etsi pleno iure dominorum fuerint, numquam aut cives Romanos aut Latinos fieri dicemus, sed omni modo dediticiorum numero constitui intellegemus.

Gai. 1, 18

Quod autem de aetate servi requiritur, lege Aelia Sentia introductum est. Nam ea lex minores XXX annorum servos non aliter voluit manumissos cives Romanos fieri, quam si vindicta, apud consilium iusta causa manumissionis adprobata, liberati fuerint. Iusta autem causa manumissionis est veluti si quis filium filiamve aut fratrem sororemve naturalem, aut alumnum, aut paedagogum, aut servum procuratoris habendi gratia, aut ancillam matrimonii causa apud consilium manumittat. Consilium autem adhibetur in urbe Roma quidem quinque senatorum et quinque equitum Romanorum puberum; in provinciis autem viginti recuperatorum civium Romanorum, idque fit ultimo die conventus; sed Romae certis diebus apud consilium manumittuntur.

Item eadem lege minori XX annorum domino non aliter manumittere permittitur, quam si vindicta apud consilium iusta causa manumissionis adprobata fuerit.

upon by a law or by an edict of the provincial governor, cf. *lex Antonia de Termessibus*, Bruns, *Fontes*[6], p. 94; Liv. 1, 38; 7, 31; 9, 9; Cic. *in Verr.* 2, 2, 16, 39; *ad Att.* 6, 1, 15.

11. **filium aut fratrem**: since slaves are without proprietary and family rights, it may be questioned how a father can manumit his own son or daughter. Such a case could arise where a slave father had been made heir (*heres solus et necessarius*), and had obtained his freedom thereby. The inheritance might include among the slaves his own near relations, whom he could then manumit. A man might manumit his brother where the father had had a child born from a slave woman and also another born from a legal marriage. The latter (*filius legitimus*), upon succession to his father's estate,

Inst. 1, 6

Non tamen cuicumque volenti manumittere licet. Nam is qui in fraudem creditorum manumittit nihil agit, quia lex Aelia Sentia impedit libertatem. Licet autem domino, qui solvendo non est, testamento servum suum cum libertate heredem instituere, ut fiat liber heresque ei solus et necessarius, si modo nemo alius ex eo testamento heres extiterit, aut quia nemo heres scriptus sit, aut quia is qui scriptus est qualibet ex causa heres non extiterit. Idque eadem lege Aelia Sentia provisum est et recte: valde enim prospiciendum erat, ut egentes homines, quibus alius heres extaturus non esset, vel servum suum necessarium heredem habeant, qui satisfacturus esset credi-

would become master of the former (*fratrem naturalem*).

2. **in fraudem creditorum**: the *lex Aelia Sentia* further provided that the manumission of slaves which impaired the rights of creditors was void *ab initio*, when the owner was already insolvent or became so by reason of the diminution of his assets caused by such a manumission (*alienatio in fraudem creditorum*). If the creditors failed to question the manumission as fraudulent, the slave was considered free; or if the liabilities of the master were satisfied before the manumission was impugned, the slave was free.

4. **solvendo non est**: *insolvent*. This use of the dat. of the gerund is frequent in legal Latin. See H. 542, II; L. 2257; A. & G. 505.

6. **heres solus et necessarius**: since the heir originally assumed all the liabilities of the deceased, an inheritance might prove to be such a burden, especially if insolvent, that it would be refused. It was customary, therefore, for an insolvent testator to institute his slave alone as obligatory heir (*i.e. solus et necessarius*), who, in return for the assumption of liabilities and the duty of performing the proper funeral rites, etc., obtained freedom and citizenship (*praesumptio libertatis*). The slave then received the stigma resulting from bankrupt proceedings and relieved the memory of the deceased from the ensuing ignominy (*necessarius heres est servus cum libertate heres institutus, ideo sic appellatus, quia sive velit sive nolit omni modo post mortem testatoris protinus liber et heres est*, Gai. 2, 153).

10. **egentes homines**: *bankrupts*.

11. **vel . . . aut**: rare as correlatives.

toribus, aut hoc eo non faciente creditores res hereditarias servi nomine vendant, ne iniuria defunctus afficiatur. Idemque iuris est et si sine libertate servus heres institutus est. Quod nostra constitutio non solum in domino, qui solvendo non est, sed generaliter constituit nova humanitatis ratione, ut ex ipsa scriptura institutionis etiam libertas ei competere videatur, cum non est verisimile eum, quem heredem sibi elegit, si praetermiserit libertatis dationem, servum remanere voluisse et neminem sibi heredem fore. In fraudem autem creditorum manumittere videtur, qui vel iam eo tempore quo manumittit solvendo non est, vel qui datis libertatibus desiturus est solvendo esse. Praevaluisse tamen videtur, nisi animum quoque fraudandi manumissor habuit, non impediri libertatem, quamvis bona eius creditoribus non sufficiant; saepe enim de facultatibus suis

1. **hoc eo non faciente**: 'or if the slave should not do this, that the creditors may sell the estate.'

2. **ne iniuria afficiatur**: the personal disgrace (*iniuria*) attaching to the memory of the dead, and caused by the sale of property for the liquidation of debts, was here transferred to the insolvent debtor's slave (*ut ignominia, quae accidit ex venditione bonorum, hunc potius heredem quam ipsum testatorem contingat*, Gai. 2, 154).

6. **ex ipsa scriptura**: 'by the mere appointment of a slave as heir, the gift of liberty is implied.'

7. **cum non est**: 'for it is unlikely that the testator (*eum*), even if he has neglected to mention the direct grant of liberty, wished that the one whom he has designated as his heir should remain a slave, and that he himself should have no heir.'

9. **neminem sibi heredem fore**: the slave, having no legal capacity, could, of course, not take the inheritance (*i.e.* he lacked *testamenti factio passiva*) without the *datio libertatis* (expressed or implied) which operates immediately after the testator's death.

13. **animum fraudandi habuit**: in questions of fraud, it is necessary that the fact, as well as the intention, be considered (*fraudis interpretatio semper in iure civili non ex eventu duntaxat, sed ex consilio quoque desideratur*, D. 50, 17, 79).

amplius quam in his est sperant homines. Itaque tunc intellegimus impediri libertatem, cum utroque modo fraudantur creditores, id est et consilio manumittentis et ipsa re, eo quod bona non suffectura sunt creditoribus.

Ulp. 1, 24

Lex Fufia Caninia iubet testamento ex tribus servis non plures quam duos manumitti, et usque ad X dimidiam partem manumittere concedit; a X usque ad XXX tertiam partem, ut tamen adhuc quinque manumittere liceat aeque ut ex priori numero; a triginta usque ad centum quartam partem, aeque ut decem ex superiori numero liberari possint; a centum usque ad quingentos partem quintam, similiter ut ex antecedenti numero viginti quinque possint fieri liberi. Et denique praecipit, ne plures

3. **ipsa re, eo quod**: 'and in fact, that is, because.'

5. **Lex Fufia Caninia**: the design of Augustus in enacting this law (8 A.D.) was to impose restrictions on wholesale and reckless freeing of slaves. The sources state that the Romans, in emancipating slaves in such great numbers, were actuated by generosity, avarice, or weakness; some desired to reward faithful service; others, to obtain in the name of their freedmen (*iure patronatus*) the grain distributed to poor citizens from the public crib; still others sought to gratify personal vanity by making provision for brilliant funeral pageants, attended by numerous freedmen, witnesses of the testators' generosity, even in death. Reckless manumission during the master's lifetime was regulated chiefly by economic reasons — lessening of property; but Augustus sought to restrict the foolish gratification of vanity, which was really at the expense of the heir. His policy of caution in extending the Roman franchise and emancipating slaves was recommended in his will for future observance. Justinian repealed the *lex Fufia* as inappropriate to his time.

8. **ut adhuc quinque manumittere liceat**: it was allowable that the lowest number of any higher class equal the highest number of each preceding class, otherwise, although the owner of ten slaves could manumit five (*dimidiam partem*), the owner of twelve could not manumit more than four (*tertiam partem*) and so on up. Cf. also Gai. 1, 45.

omnino quam centum ex cuiusquam testamento liberi fiant. Eadem lex cavet, ut libertates servis testamento nominatim dentur.

Gai. 1, 46

Si testamento scriptis in orbem servis libertas data sit, quia nullus ordo manumissionis invenitur, nulli liberi erunt, quia lex Fufia Caninia, quae in fraudem eius facta sint, rescindit.

Freedom acquired without Consent of Master

Modest. D. 40, 8, 2

Servo, quem pro derelicto dominus ob gravem infirmitatem habuit, ex edicto divi Claudii competit libertas.

2. libertates testamento nominatim dentur: the manumission of all above the lawful number was void. The provisions of the *lex Fufia* might otherwise be avoided, either by omitting the names of slaves (*e.g.* I manumit 'all my slaves') or by writing their names in a circle so that the separation of those in excess of the limit was impossible (*libertas non videbatur posse incertae personae dari*, Inst. 2, 20, 25).

Freedom acquired without Consent of Master: under the empire it was the policy of the law to encourage manumission (to a reasonable degree) and to protect the slave against cruelty. Reforms begun by the earlier emperors were continued by some of the Christian emperors, though it should be remarked that the influence of Christianity on the spirit of Roman legislation is probably overrated. Social and economic reasons were more prominent in ameliorating the condition of slaves. After the Servile Wars in Sicily and elsewhere at different times, the dangers from a concerted uprising of slaves, driven by maltreatment to deeds of violence, were, as is shown by the legislation of Augustus, felt to be menacing. The Romans possessed such a vast amount of property in slaves, the public welfare was a stronger motive in legislation than was evangelic humanity. Abuse of property was regarded then as now as an infringement of the public welfare (*expedit enim rei publicae, ne quis re sua utatur male*, Inst. 1, 8, 2). Milman, *Latin Christianity*, I, p. 493. In certain exceptional cases freedom was acquired under the empire

Just. C. 7, 6, 1, 3

Sed scimus etiam hoc esse in antiqua Latinitate ex edicto divi Claudii introductum, quod, si quis servum suum aegritudine periclitantem sua domo publice ciecerit neque ipse eum procurans neque alii eum commendans, cum erat ei libera facultas, si non ipse ad eius curam sufficeret, in xenonem eum mittere vel quo poterat modo eum adiuvare, huiusmodi servus in libertate Latina antea morabatur et, quem ille moriendum dereliquit, eius bona iterum, cum moreretur, accipiebat. Talis itaque servus libertate necessaria a domino et nolente re ipsa donatus fiat ilico civis Romanus nec aditus in iura patronatus quondam domino reservetur. Quem enim a sua domo suaque familia publice reppulit neque ipse eum procurans neque alii commendans neque in venerabilem xenonem cum mittens neque consueta ei praebens salaria, maneat ab eo eiusque substantia undique segregatus tam in omni

without the owner's consent (*sine manumissione*): as a reward for the detection of certain crimes, *e.g.* when a slave discovered the murderer of his master, according to a SC under Augustus; in cases of negligent and cruel treatment, as when a master abandoned a sick or infirm slave, according to a SC under Claudius; in various cases after Trajan, where liberation was effected by the intervention of a magistrate; after a law of Leo, by appointment to certain court offices; and after Justinian's enactment, by the assumption of priestly orders.

1. **antiqua Latinitate**: *antiqua* is used with reference to the time of Justinian (*scimus*, *i.e.* Justinian). That Latin citizenship is meant which was introduced by the *lex Iunia Norbana*, whereby freedom with a qualified citizenship was granted, *i.e.* with *commercium* only, a right to be distinguished from the more ancient *ius Latii cum conubio et commercio*. Cf. note on *libertorum*, p. 89.

11. **aditus in iura patronatus**: see note on *patrono*, p. 103, for further explanation.

12. **quondam**: this adjective use of the word in the sense of *former*, *late*, etc. (not necessarily of those deceased), is very common in legal Latin.

15. **maneat ab eo**: 'let the quondam master be deprived of all interest in him and his property, not only

tempore vitae liberti quam cum moriatur nec non postquam iam fuerit in fata sua concessus.

Marcian. D. 40, 8, 5 Qui ob necem detectam domini praemium libertatis consequitur, fit orcinus libertus.

5 Paul. D. 40, 8, 1 Si servus venditus est, ut intra certum tempus manumitteretur, etiamsi sine herede decessissent et venditor et emptor, servo libertas competit; et hoc divus Marcus rescripsit. Sed et si mutaverit venditor voluntatem, nihilo minus libertas competit.

Relation of Patron and Freedman

10 Ulp. D. 37, 15, 9 Liberto et filio semper honesta et sancta persona patris ac patroni videri debet.

during the entire lifetime of the freedman and at his death, but also after his death forever.'

4. orcinus libertus: cf. note on *testamento*, p. 91.

6. sine herede: hence the slave is without a master to carry out the intention; freedom is nevertheless acquired by operation of law.

Relation of Patron and Freedman: although since the time of Servius Tullius (Dion. 4, 22) a *libertinus* became a Roman citizen when his *manumissor* was a citizen, nevertheless the position of *libertinus* differs from that of the *ingenuus* (*a*) in the department of public law, where the former possessed limited public rights only, and (*b*) in the peculiar relation which the *libertinus* sustained toward his *manumissor* or *patronus*. Among public rights, freedmen lacked the *ius honorum*; eligibility to the senate and to the office of *decurio*; and qualifications for serving in the *legio*. Pretension to these privileges was punished as a misdemeanor. They possessed the private rights of *conubium* and *commercium*. The peculiar relation which the freedman bore toward his patron arose from the idea that manumission was of the nature of rebirth. The freedman owed his legal personality and his name (*nomen gentilicium*) to his patron, and, in return, was bound to filial duty and obedience, as a son, even when freed from *patria potestas*, was bound to his father (*honesta et sancta persona patris ac patroni*).

Paul. D. 37, 14, 19 Ingratus libertus est, qui patrono obsequium non praestat vel res eius filiorumve tutelam administrare detractat.

Ulp. D. 37, 14, 1 Patronorum querellas adversus libertos praesides audire et non translaticie exsequi debent, cum, si ingratus libertus sit, non impune ferre eum oporteat. Sed si quidem inofficiosus patrono patronae liberisve eorum sit, tantummodo castigari eum sub comminatione aliqua severitatis non defuturae, si rursum causam querellae praebuerit, et dimitti oportet. Enimvero si contumeliam fecit aut convicium eis dixit, etiam in exilium temporale dari debebit; quod si manus intulit, in metallum dandus erit; idem et si calumniam aliquam eis instruxit vel delatorem subornavit vel quam causam adversus eos temptavit.

1. **patrono obsequium non praestat**: the freedman owes respect and obedience to his patron (*reverentia*, *obsequium*). Violation of this duty was punishable by private chastisement (*levis coercitio*), by fines, and by return to slavery (*revocatio in servitutem*, cf. note on *iure civili*, p. 80). The freedman was forbidden to bring an action against his patron, or his patron's parents or children, without the permission of a magistrate, and he was also bound to support any or all of these in case of need. The freedman owes his patron certain services (*operae liberti officiales*), such as the management of the latter's property and the tutelage of his children, along with various other services and obligations (*libertatis causa imposita*). The patron and his children acquired the rights of inheritance to intestate freedmen, as well as guardianship over them for life.

5. **translaticie exsequi**: *punish lightly; trans-laticie (ferre)*, 'that which has been handed over' (cf. *edictum translaticium*, Introd. 5), then, 'usual'; and eventually, 'negligently, lightly.'

11. **convicium**: *convicium appellatur quasi convocium . . . non omne maledictum convicium esse, sed id solum, quod vociferatione dictum est, sive unus sive plures dixerint*, D. 47, 10, 15. Cf. note on *convicium*, p. 251.

13. **calumniam**: 'malicious prosecution' (*calumniatores appellati sunt, quia per fraudem et frustrationem alios vexarent litibus*, D. 50, 16, 233).

Definition of the Term Family (*Familia*)

Ulp. D. 50, 16, 195, 1

Familiae appellatio qualiter accipiatur, videamus. Et quidem varie accepta est; nam et in res et in personas deducitur. In res, ut puta in lege duodecim tabularum his verbis 'adgnatus proximus familiam habeto.' Ad personas autem refertur familiae significatio ita, cum de patrono et liberto loquitur lex: 'ex ea familia,' inquit, 'in eam familiam': et hic de singularibus personis legem loqui constat. Familiae appellatio refertur et ad corporis cuiusdam significationem, quod aut iure proprio ipsorum aut communi universae cognationis continetur. Iure proprio familiam dicimus plures personas, quae sunt sub unius potestate aut natura aut iure subiectae, ut puta patrem familias, matrem familias, filium familias, filiam familias quique deinceps vicem eorum sequuntur,

Definition of the Term Family: *familia* has a much wider meaning than our word *family*. Instead of the natural ties of blood and affection, the Roman family is based upon a purely legal concept, having as a bond of union a civil and an artificial tie. *Familia* embraces everything subordinated to the private authority of a Roman citizen. Things (*res*) as well as men, free and slaves; property as well as persons — all are included within the conception of this term. Designating individuals, it embraces all of common lineage and all bound together in a family relation by a legal act (*e.g.* adoption), who were or are subjected to a common paternal authority. One not subject to such authority and independent of family subordination is *persona sui iuris*, and such a person, as constituting the head of an independent *familia* is called *paterfamilias* or *materfamilias*. The *paterfamilias* is possessor of all the private rights of a Roman citizen and is capable of exercising domestic authority. Those free persons subjected to the authority of another, to whom their independent will is surrendered, are *personae alieni iuris*. Of these persons there are three classes: (*a*) *personae in patria potestate*; (*b*) *uxor in manu*; (*c*) *personae in mancipio*, cf. Gai.

ut puta nepotes et neptes et deinceps. Pater autem familias appellatur, qui in domo dominium habet, recteque hoc nomine appellatur, quamvis filium non habeat; non enim solam personam eius, sed et ius demonstramus; denique et pupillum patrem familias appellamus. Et cum pater familias moritur quotquot capita ei subiecta fuerint, singulas familias incipiunt habere; singuli enim patrum familiarum nomen subeunt. Idemque eveniet et in eo qui emancipatus est; nam et hic sui iuris effectus propriam familiam habet. Communi iure familiam dicimus omnium adgnatorum; nam etsi patre familias mortuo singuli singulas familias habent, tamen omnes, qui sub unius potestate fuerunt, recte eiusdem familiae appellabuntur, qui ex eadem domo et gente proditi sunt. Servitutium quoque solemus

1, 49. For *servi in dominica potestate*, see note on *de manu*, p. 88.

1. **Pater familias appellatur, qui in domo dominium habet**: it is apparent that *paterfamilias* does not signify or imply paternity, but one who is not *in patria potestate*, *i.e.* a *homo sui iuris*, whether he be infant or adult, married or unmarried.

4. **ius demonstramus**: *ius* means here 'legal position.'

8. **qui emancipatus est**: as early as the Twelve Tables, the lifelong authority of the *paterfamilias* could be interrupted by the formal alienation of a son by three sales, of other *liberi* by one sale: *filius quidem tribus mancipationibus, ceteri vero liberi* (*i.e.* grandchildren, daughters, etc.), *sive masculini sexus sive feminini una mancipatione exeunt de parentum potestate; lex enim XII tabularum tantum in persona filii de tribus mancipationibus loquitur his verbis 'si pater filium ter venum duit, a patre filius liber esto,'* Gai. 1, 132.

10. **familiam omnium adgnatorum**: see note, p. 107, for explanation of agnatic family.

14. **Servitutium**: the gen. plur. of this word, otherwise rare, is frequent in the Digest. *Servitus* is used here for the concrete *servitium*, meaning 'slaves.' Mommsen proposes the reading *servitium quoque solemus appellare familiam*, *i.e.* 'we usually designate slaves, too, by the word *familia*.'

appellare familias, ut in edicto praetoris ostendimus sub titulo de furtis, ubi praetor loquitur de familia publicanorum. Sed ibi non omnes servi, sed corpus quoddam servorum demonstratur huius rei causa paratum, hoc est vectigalis causa. Alia autem parte edicti omnes servi continentur, ut de hominibus coactis et vi bonorum raptorum, item redhibitoria, si deterior res reddatur emptoris opera aut familiae eius, et interdicto unde vi familiae appellatio omnes servos comprehendit. Sed et filii continentur. Item appellatur familia plurium personarum, quae ab eiusdem ultimi genitoris sanguine proficiscuntur (sicuti dicimus familiam Iuliam), quasi a fonte quodam

2. ubi praetor loquitur de familia publicanorum: for this usage see D. 39, 4, 12, *familiae autem appellatione hic servilem familiam contineri sciendum est . . . publicani autem dicuntur, qui publica vectigalia habent conducta.*

6. ut (sc. *in edicto*) **de hominibus**: for this usage see D. 47, 8, 2.

7. redhibitoria: sc. *actione*. See *e.g.* D. 21, 1, 1 and 25, *sive ipse deteriorem eum* (*servum*) *fecit sive familia eius sive procurator, tenebit actio, i.e.* an action for the rescinding of a contract of sale (*redhibere*, 'to restore to a former condition'), if the thing sold has diminished in value.

8. interdicto unde vi: see *e.g.* D. 43, 16, 1, 15. The interdict *unde vi* (so called from its initial words) was a magisterial order whereby one deprived of property by violence might recover possession. The cases mentioned here are all examples of technical remedies granted by the praetor and the aedile in their edicts, cf. Introd. 5, on the nature of the edict.

12. quasi a fonte quodam memoriae: it is somewhat doubtful what this means. For *quodam memoriae*, Mommsen reads *eodem ortae*, as if the text were corrupt. But *memoria* seems to have a somewhat similar meaning, D. 50, 16, 220, 3, *etenim idcirco filios filiasve concipimus atque edimus, ut ex prole eorum earumve diuturnitatis nobis memoriam in aevum relinquamus, i.e.* 'that we may leave a memorial of our ancient lineage for all time to come.' In this sense, *familia* is used as if it were *a fonte quodam memoriae, i.e.* expressed the fountain head of our ancestry. Such explana-

memoriae. Mulier autem familiae suae et caput et finis est.

Gai. D. 50, 16, 196

Familiae appellatione et ipse princeps familiae continetur. Feminarum liberos in familia earum non esse palam est, quia qui nascuntur, patris familiam sequuntur.

Ulp. 4, 1

Sui iuris sunt familiarum suarum principes, id est pater familiae itemque mater familiae.

Ulp. D. 1, 6, 4

Patres familiarum sunt, qui sunt suae potestatis sive puberes sive impuberes; simili modo matres familiarum, filii familiarum et filiae quae sunt in aliena potestate.

The Agnatic Family (*Familia iuris civilis*)

Gai. 3, 10

Vocantur autem agnati, qui legitima cognatione iuncti sunt. Legitima autem cognatio est ea, quae per virilis sexus personas coniungitur. Itaque

tions are common in legal Latin, cf. Paulus, 2, 12, 2, *depositum est quasi diu positum*; D. 39, 2, 3, *damnum et damnatio ab ademptione et quasi deminutione patrimonii dicta sunt*; Ulpian, D. 50, 16, 31, *pratum . . . ex eo dictum, quod paratum sit ad fructum capiendum*, etc. (Kalb, *Roms Juristen*, p. 44, note 1). Cf. also note on *curias*, p. 45.

1. **Mulier familiae suae et caput et finis est**: this maxim means that a woman *sui iuris* constitutes the only possible member of her own family; for by her marriage with *manus* she passes into the *familia* of her husband; and she is *finis familiae suae*, because her children are in the *familia* of their father.

10. **sive puberes sive impuberes**: girls were *impuberes* until the completion of the twelfth year of age; boys, originally until the assumption of the *toga virilis*, but later, until the completion of the fourteenth year.

Agnatic Family: *agnati* are all of those who are under the same *patria potestas*, or who would be under the same *patria potestas* if the common ancestor were still living. Agnation, therefore, includes not only those sprung from a com-

eodem patre nati fratres agnati sibi sunt, qui etiam consanguinei vocantur, nec requiritur, an etiam matrem eandem habuerint. Item patruus fratris filio et invicem is illi agnatus est. Eodem numero sunt fratres patrueles inter se, id est qui ex duobus fratribus progenerati sunt, quos plerique etiam consobrinos vocant. Qua ratione scilicet etiam ad plures gradus agnationis pervenire poterimus.

Cognatic Relationship (*Familia iuris gentium*)

Paul. D. 38, 10, 10, 1

Nomen cognationis a Graeca voce dictum videtur: *συγγενεῖς* enim illi vocant, quos nos cognatos appellamus. Cognati sunt et quos adgnatos lex duodecim tabularum appellat, sed hi sunt per patrem cognati ex eadem familia; qui autem per feminas coniunguntur, cognati tantum nominantur.

mon ancestor, but also those brought artificially under the *patria potestas* of a common *paterfamilias* (*e.g.* by *adoptio*, *in manum conventio*, etc.); for unlike the family based upon blood relationship, the ties of the agnatic family may be changed at will (*e.g.* by marriage, in case of a woman, or by emancipation). The family peculiar to the *ius civile* is the agnatic (*cognatio legitima*), whereas that of the *ius gentium* is the cognatic (*cognatio naturalis*, *per feminas*). *Cognati* are those whose relationship is based on the ties of blood instead of subjection to the power of the same *paterfamilias*. Cognation is a natural tie; agnation, an artificial tie created by law. The old law recognized the agnatic principle only, but through the agency of the praetor, cognates gained more and more recognition, until finally, under the imperial legislation, the cognatic principle prevailed.

11. **hi sunt per patrem cognati**: *cognatio* is used in two senses. In the broader meaning of the word, it includes *agnatio* — all cognates are agnates, but the reverse is not true. In the narrower sense, it means relationship through the mother, as *agnatio* means relationship through the father.

12. **per feminas**: *i.e. de femina*.

Modest. D. 38, 10, 4, 1

Cognati ab eo dici putantur, quod quasi una communiterve nati vel ab eodem orti progenitive sint. Cognationis substantia bifariam apud Romanos intellegitur; nam quaedam cognationes iure civili, quaedam naturali conectuntur, nonnumquam utroque iure concurrente et naturali et civili copulatur cognatio. Et quidem naturalis cognatio per se sine civili cognatione intellegitur quae per feminas descendit, quae volgo liberos peperit. Civilis autem per se, quae etiam legitima dicitur, sine iure naturali cognatio consistit per adoptionem. Vtroque iure consistit cognatio, cum iustis nuptiis contractis copulatur. Sed naturalis quidem cognatio hoc ipso nomine appellatur; civilis autem cognatio licet ipsa quoque per se plenissime hoc nomine vocetur, proprie tamen adgnatio vocatur, videlicet quae per mares contingit.

Collat. 16, 3, 15

Consanguinei sunt eodem patre nati, licet diversis matribus, qui in potestate fuerunt mortis tempore; adoptivus quoque frater, si non sit emancipatus, et hi qui post mortem patris nati sunt vel causam probaverunt.

Ulp. D. 38, 10, 10, 4

Inter agnatos igitur et cognatos hoc interest quod inter genus et speciem; nam qui est agnatus, et cognatus est, non utique autem qui cognatus est, et agnatus est; alterum enim civile, alterum naturale nomen est.

19. **vel causam probaverunt**: *patria potestas* arises primarily by birth from a lawful marriage, but exceptionally by the *lex Aelia Sentia*, in the case of Latini who acquired citizenship by *anniculi causae probatio*, *i.e.* by rearing a child to the age of one year and furnishing proof of conformity to other requirements (*causam probare*). For details see Gai. 1, 29–31.

Marriage

Inst. 1, 9, 1 Nuptiae sive matrimonium est viri et mulieris coniunctio, individuam consuetudinem vitae continens.

Modest. D. 23, 2, 1 Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio.

Marriage: the essence of a Roman marriage, distinguishing it from any other union of the sexes (*e.g. concubinatus*, *contubernium*), was *maritalis affectio* (*non enim coitus matrimonium facit, sed maritalis affectio*). Strictly speaking, no ceremony was required for entrance into the marriage relation; consent of the parties concerned and a manifestation of *maritalis affectio* were sufficient. With reference to the legal position of the wife, the Romans recognized different kinds of marriage. The earliest marriage at Rome involved the transfer of the wife from the family of her father into the family of her husband (*in manum conventio*), thereby establishing a marital authority, called *manus mariti*, which placed the wife *in loco filiae* and under the *patria potestas* of her own husband (cf. note on *Manus*, p. 125). As early as the Twelve Tables, the *ius civile* recognized a marriage without *manus*, by which the wife did not pass into the *familia* of her husband, and consequently did not have legal relationship with her own children. With reference to the legal consequences of marriage and the wife's position, the Roman law distinguishes three periods: marriage with *manus*; separation of marriage and *manus*; and the disappearance of *manus*. Toward the end of the republic, marriage without *manus* was the more usual, and under the empire it became the only marriage.

1. **Nuptiae sive matrimonium**: there is no distinction of meaning discernible in the legal usage of these words.

4. **Nuptiae sunt coniunctio**: the second definition of marriage (by Modestinus) explains somewhat more fully that of the Institutes. *Individua consuetudo vitae* of the latter denotes a continued and inseparable (*individua* in the later meaning of 'inseparable,' 'permanent') union of man and woman, involving a community of all the relations of life, rank, position, domicile, etc., but not of property. The wife *in manu* relinquished all proprietary rights (*si quam in ma-*

Ulp. 5, 2

Iustum matrimonium est, si inter eos, qui nuptias contrahunt, conubium sit, et tam masculus pubes quam femina potens sit, et utrique consentiant, si sui iuris sint, aut etiam parentes eorum, si in potestate sunt. Conubium est uxoris iure ducendae facultas. Conubium habent cives Romani cum civibus Romanis; cum Latinis autem et peregrinis ita, si concessum sit. Cum servis nullum est conubium.

Inst. 1, 10

Iustas autem nuptias inter se cives Romani contrahunt, qui secundum praecepta legum coeunt, masculi quidem puberes, feminae autem viripotentes, sive patres familias sint sive filii familias, dum tamen filii familias et consensum habeant parentum, quo-

num ut uxorem receperimus, eius res ad nos transeunt, Gai. 2, 98), while in a marriage *sine manu* neither party had rights in the property of the other.

1. **Iustum matrimonium**: attention has already been called to the distinction between marriage *iuris civilis*, requiring *conubium* of both parties (*iustum, legitimum matrimonium; iustae, legitimae nuptiae*), and marriage *iuris gentium*, not requiring *conubium* (*non legitimum*). Only the former produced *patria potestas* over the children of the marriage (*legitimi*).

2. **masculus pubes**: cf. note on *sive*, p. 107.

9. **Iustas nuptias inter se cives Romani**: a legal marriage required the fulfillment of the following conditions: (*a*) the parties must have the *conubium*; (*b*) they must consent and give due evidence of their intention to marry, and if they are not *sui iuris*, they must also have the consent of their respective *patresfamilias*; (*c*) they must be of lawful age (*puberes*); (*d*) they must not be within the prohibited degrees of relationship.

13. **consensum habeant parentum**: according to the family law of the *ius civile* a son remained in the lifelong power of his oldest living ascendant (whether he be father, grandfather, or great-grandfather), hence if one's father and a higher ascendant (*e.g.* grandfather) are both living, he must have the consent of both of them (*iussum parentis praecedere debeat*), since at the death of the grandfather (A) the father (B) becomes *paterfamilias*, and the latter's son (C) might otherwise have introduced mem-

rum in potestate sunt. Nam hoc fieri debere et civilis et naturalis ratio suadet in tantum, ut iussum parentis praecedere debeat. Vnde quaesitum est, an furiosi filia nubere aut furiosi filius uxorem ducere possit. Cumque super filio variabatur, nostra processit decisio, qua permissum est ad exemplum filiae furiosi filium quoque posse et sine patris interventu matrimonium sibi copulare secundum datum ex constitutione modum.

Paul. 2, 20

Eo tempore, quo quis uxorem habet, concubinam habere non potest. Concubina igitur ab uxore solo dilectu separatur.

bers into his (B's) family without his (B's) consent, a possibility which was contrary to the spirit of the family law. This question could not arise in the case of a daughter, because she introduced no new members into her father's family (cf. note on *Mulier*, p. 107). *Parentes* in this connection does not mean 'parents' but 'male ascendants.'

4. aut furiosi filius uxorem ducere possit: as consent was necessary, the question arose whether the son of a madman was able to marry, since his father, being deprived of reason, could not give consent (*furor contrahi matrimonium non sinit, quia consensu opus est, sed recte contractum non impedit*, D. 23, 2, 16, 2). Justinian determined a number of ways in which the children of madmen might make a valid marriage (*nostra processit decisio*, C. 5, 4, 25).

9. concubinam habere non potest: besides legal marriage (*matrimonium iustum*, etc.), the Roman law recognized and controlled a permanent union called *concubinatus*, a form of marriage of inferior right and dignity. *Concubinatus* differed from *matrimonium* in the absence of *maritalis affectio*, and it was a relation most often entered into between a *manumissor* and his *liberta*. The *concubina* lacked the *dignitas uxoris* and did not enjoy the rank and position of her husband. Children from such a union were called *naturales liberi* and were, of course, not subject to *patria potestas*, though they were by the later law capable of becoming *legitimi* by the marriage of parents who were eligible to a legal marriage. Among the Romans *concubinatus*, like *matrimonium*, was strictly monogamous in character.

Paul. 2, 19, 6 Inter servos et liberos matrimonium contrahi non potest, contubernium potest. Neque furiosus neque furiosa matrimonium contrahere possunt; sed contractum matrimonium furore non tollitur.

Gai. 1, 64 Si quis nefarias atque incestas nuptias contraxerit, neque uxorem habere videtur neque liberos; itaque hi, qui ex eo coitu nascuntur, matrem quidem habere videntur, patrem vero non utique; nec ob id in potestate eius sunt, sed tales sunt quales sunt hi, quos mater vulgo concepit; nam et hi patrem habere non intelleguntur, cum is etiam incertus sit; unde solent spurii filii appellari, vel a Graeca voce quasi *σποράδην* concepti, vel quasi sine patre filii.

2. **contubernium potest**: no union of slaves or of slaves with freemen was recognized as marriage. Inasmuch as slaves were capable of becoming persons by manumission and as *libertini* had the right of marriage, the law recognized near relationship among slaves as a bar to their intermarriage after manumission (*illud certum est serviles cognationes impedimento esse nuptiis, si forte pater et filia aut frater et soror manumissi fuerint*, Inst. 1, 10, 10).

4. **matrimonium furore non tollitur**: the marriage of a lunatic is void *ab initio*, but subsequent lunacy is not a ground for dissolving the marriage (*furiosus nullum negotium gerere potest, quia non intelligit quid agat*, Gai. 3, 106).

5. **Si quis nefarias nuptias contraxerit**: such a union is void *ab initio*, and the issue (*incestuosi*), therefore, follow the usual rule in such cases (*partus sequitur ventrem*, cf. note on *Ingenui*, p. 81). Children *quos mater vulgo concepit* are to be distinguished from those issuing from *concubinatus*; the latter are *naturales* and as such have claim upon their father for support; the former, called *spurii* (*bastards*), were dependent upon their mother for support; and, as regards paternity, were *filii nullius*.

Impediments to Marriage

Gai. 1, 58

A quarundam nuptiis abstinere debemus. Inter eas enim personas, quae parentum liberorumve locum inter se obtinent, nuptiae contrahi non possunt, nec inter eas conubium est, velut inter patrem et filiam, vel inter matrem et filium, vel inter avum et neptem; et si tales personae inter se coierint, nefarias et incestas nuptias contraxisse dicuntur. Et haec adeo ita sunt, ut quamvis per adoptionem parentum liberorumve loco sibi esse coeperint, non possint inter se matrimonio coniungi, in tantum, ut etiam dissoluta adoptione idem iuris maneat; itaque eam, quae mihi per adoptionem filiae aut neptis loco

Impediments to Marriage: impediments to marriage are either absolute or relative. Absolute impediments, rendering marriage impossible and void in all cases are: lunacy, infancy, castration, and an existing marriage; relative, preventing marriage between certain persons only, are, near relationship, differences in rank, the official position of the husband, adultery (after 18 B.C.), and seduction (after Constantine).

2. **parentum liberorumve locum inter se obtinent**: agnatic as well as cognatic relationship in the direct line (*i.e.* between ascendants and descendants) to any degree, is always an impediment to marriage. This is true also although the relationship arose through adoption into the agnatic family; for even if the one adopted has been emancipated from the family, the fiction of relationship (as if by a tie of blood) is still maintained (*idem iuris maneat*). In the collateral line, however, the rule is not so strict. In the early law, collaterals to the fourth degree could not marry (*consobrini*) but during the republic first cousins were permitted to marry, and this continued to be the rule in the Eastern empire, although not so in the Western empire. After Claudius it was legal to marry a brother's daughter (relationship of the third degree), but this was forbidden by Christian emperors. Adoption in the collateral line did not prevent marriage even between brother and sister, after the emancipation of either one of them (*adoptio dissoluta*).

esse coeperit, non potero uxorem ducere, quamvis eam emancipaverim. Inter eas quoque personas, quae ex transverso gradu cognatione iunguntur, est quaedam similis observatio, sed non tanta. Sane inter fratrem et sororem prohibitae sunt nuptiae, sive eodem patre eademque matre nati fuerint, sive alterutro eorum; sed si qua per adoptionem soror mihi esse coeperit, quamdiu quidem constat adoptio, sane inter me et eam nuptiae non possunt consistere; cum vero per emancipationem adoptio dissoluta sit, potero eam uxorem ducere; sed et si ego emancipatus fuero, nihil impedimento erit nuptiis. Fratris filiam uxorem ducere licet, idque primum in usum venit, cum divus Claudius Agrippinam, fratris sui filiam, uxorem duxisset; sororis vero filiam uxorem ducere non licet. Et haec ita principalibus constitutionibus significantur. Item amitam et materteram uxorem ducere non licet. Item eam, quae mihi quondam socrus aut nurus aut privigna aut noverca fuit. Ideo autem diximus 'quondam,' quia si adhuc constant eae nuptiae, per quas talis adfinitas quaesita est, alia ratione mihi nupta esse non potest, quia neque eadem duobus nupta esse potest, neque idem duas uxores habere.

Inst. 1, 10, 3

Fratris vel sororis filiam uxorem ducere non licet. Sed nec neptem fratris vel sororis ducere

16. **quae mihi quondam socrus aut nurus**: *affinitas*, or relationship by marriage, was the tie between each one of a married pair and the kindred of the other. Intermarriage among *affines* is prohibited in the direct line (between ascendants and descendants, and in Christian times, in the collateral line also). Marriage with a deceased brother's wife and a 'deceased wife's sister' (*i.e.* between brother-in-law and sister-in-law) was permitted until the prohibitions of Constantine and several later emperors (C. 5, 5, 5).

22. **Fratris vel sororis filiam uxorem ducere non licet**: the legalizing of the marriage of a man with his brother's daughter (case of Clau-

quis potest, quamvis quarto gradu sint. Cuius enim filiam uxorem ducere non licet, eius neque neptem permittitur. Eius vero mulieris, quam pater tuus adoptavit, filiam non videris impediri uxorem ducere, quia neque naturali neque civili iure tibi coniungitur. Duorum autem fratrum vel sororum liberi vel fratris et sororis iungi possunt.

Mariti tamen filius ex alia uxore et uxoris filia ex alio marito, vel contra, matrimonium recte contrahunt, licet habeant fratrem sororemve ex matrimonio postea contracto natos.

Ulp. 13, 1

Lege Iulia prohibentur uxores ducere senatores quidem liberique eorum libertinas et quae ipsae quarumve pater materve artem ludicram fecerit, item corpore quaestum facientem. Ceteri autem ingenui prohibentur ducere lenam et a lenone lenave manumissam et in adulterio deprehensam et iudicio publico damnatam et quae artem ludicram fecerit.

dius and Agrippina) was repealed by Constantine, hence the apparent contradiction in the text (cf. note on *parentum*, p. 114). It was unlawful to marry the ascendant or descendant of one already within the prohibited degree (*sororis filiam . . . nec neptem*).

3. Eius mulieris, quam pater tuus adoptavit, filiam: as a '*mulier et caput et finis suae familiae est*,' her children did not follow her into her adoptive family; hence they were not related to its members (*neque naturali neque civili iure*). Cf. note on *Mulier*, p. 107.

11. senatores liberique eorum libertinas: differences in rank and political status were recognized in the law of marriage during its entire history prior to Justinian. Originally there was no marriage between *cives* and *peregrini*. Until the *lex Canuleia* (445 B.C.) there was no *conubium* between patricians and plebeians. During the republic, *ingenui* and *libertini* could intermarry, but with a loss of social standing to the former. The *lex Iulia de maritandis ordinibus* (4 A.D.) forbade senators and their descendants to the third generation to marry *libertini* and certain other classes of persons disqualified by their occupations and social status (*e.g. infames*). *Ingenui*

Paul. D. 23, 2, 38 Si quis officium in aliqua provincia administrat, inde oriundam vel ibi domicilium habentem uxorem ducere non potest, quamvis sponsare non prohibeatur.

Paul. D. 23, 2, 59 Senatus consulto, quo cautum est, ne tutor pupillam vel filio suo vel sibi nuptum collocet, etiam nepos significatur.

Paul. D. 23, 2, 66 Non est matrimonium, si tutor vel curator pupillam suam intra vicesimum et sextum annum non desponsam a patre nec testamento destinatam ducat uxorem vel eam filio suo iungat: quo facto uterque infamatur et pro dignitate pupillae extra ordinem coercetur. Nec interest, filius sui iuris an in patris potestate sit.

Tryph. D. 23, 2, 67 Non solum vivo tutori, sed et post mortem eius filius tutoris ducere uxorem prohibetur eam, cuius tutelae rationi obstrictus pater fuit.

were also forbidden to marry persons of the last mentioned class. By the *lex Iulia* such marriages were not void, but were penalized. The emperor M. Aurelius declared them void, and Justinian made them completely valid, the old differences of status having passed away.

1. **Si quis officium in aliqua provincia administrat**: this prohibition, directed particularly against the marriage of governors of provinces and of soldiers stationed in provinces, was prompted by public welfare.

9. **intra vicesimum et sextum annum**: full majority was attained with the completion of the twenty-fifth year. Until that time the *pupilli* required the assistance of a *curator* in the management of their affairs (*masculi puberes et feminae viripotentes usque ad vicesimum quintum annum completum . . . licet puberes sint, adhuc huius aetatis sunt, ut negotia sua tueri non possint*, Inst. 1, 23).

12. **uterque infamatur**: *i.e.* both the tutor and the curator. The office of tutor and curator was a public duty (*munus publicum*), and such a marriage, unless directed by the will of the woman's father, was regarded as a breach of trust and contrary to public policy.

Paul. D. 23, 2, 2 Nuptiae consistere non possunt nisi consentiant omnes, id est qui coeunt quorumque in potestate sunt.

Ulp. D. 23, 2, 9 Si nepos uxorem velit ducere avo furente, omnimodo patris auctoritas erit necessaria; sed si pater furit, avus sapiat, sufficit avi voluntas. Is cuius pater ab hostibus captus est, si non intra triennium revertatur, uxorem ducere potest.

Pompon. D. 23, 2, 5 Mulierem absenti per litteras eius vel per nuntium posse nubere placet, si in domum eius deduceretur; eam vero quae abesset ex litteris vel nuntio suo duci a marito non posse; deductione enim opus esse in mariti, non in uxoris domum, quasi in domicilium matrimonii.

1. **Nuptiae consistere non possunt**: absence of consent, or withholding of consent (except under certain limitations), was an impediment to marriage (*nuptias non concubitus sed consensus facit*, D. 35, 1, 15). As marriage in the earliest period was always attended by *manus*, the forms of acquiring *manus* and the forms of entering marriage became identified, *i.e. confarreatio*, *coemptio*, and *usus* (cf. note on *Manus*, p. 125, and following notes). In the later law, marriage without *manus* required nothing more than the consent of the parties, openly and unequivocally manifested. A usual manifestation of consent (though no part of the requirement of the marriage contract, except when the husband was absent) was the *deductio in domum mariti*; hence the marriage could be entered into if the consent of the man was expressed by letter or messenger (owing to his absence), and if the consent of the woman was manifested by her *deductio in domum* by the relatives of her future husband. Owing to this requirement of delivery of possession, the woman must be present in the domicile of her husband.

6. **Is cuius pater . . . uxorem ducere potest**: this applies to both sexes. If the father return after the period of three years, he cannot dissolve the marriage because of his disapproval.

Betrothal

Florent. D. 23, 1, 1 Sponsalia sunt mentio et repromissio nuptiarum futurarum.

Ulp. D. 23, 1, 2 Sponsalia autem dicta sunt a spondendo; nam moris fuit veteribus stipulari et spondere sibi uxores futuras,

Florent. D. 23, 1, 3 unde et sponsi sponsaeque appellatio nata est.

Ulp. D. 23, 1, 4 Sufficit nudus consensus ad constituenda sponsalia. Denique constat et absenti absentem desponderi posse, et hoc cottidie fieri.

Betrothal: in the earliest law, engagements to marry were made by the formal *sponsio* (cf. note on *Verbis*, p. 205) between the bridegroom and the bride's father. This form of betrothal was retained in the Latin law (*i.e.* in Latium), and a breach of promise of marriage was actionable and satisfaction was rendered in pecuniary damages (Gell. 4, 4). At Rome, however, no action lay for a breach of promise of marriage, since, by Roman law, marriage was based on a *consensus nuptialis*, but never on a *consensus sponsalicius*, a promise of future marriage. Still, in practice, marriage was often preceded by an informal agreement to marry, given either by the consent of the affianced pair or by that of their *patresfamilias*. In the latter case, the son had the unquestioned right of rejection, while the daughter could refuse only on account of the unworthiness or immoral character of the intended husband. Betrothal required that each party be seven years of age, *i.e. impuberes* might enter into an informal agreement to a future marriage. Either party might recall his promise, without showing cause for his act, but more than one engagement at a time was '*contra bonos mores*,' and caused the offender to be branded with infamy (*infamia notatur qui bina sponsalia binasve nuptias in eodem tempore constitutas habuerit*, D. 3, 2, 1). Pledges and gifts given in consideration of betrothal (*arra sponsalicia*) were forfeited by the one renouncing the engagement, except in certain cases (*osculo interveniente*, etc.).

4. **stipulari et spondere**: betrothal was originally accomplished by the form of promise known as *stipulatio*, in which the words *spondesne? spondeo* were employed, hence the words *sponsus*

Modest. D. 23, 1, 14 In sponsalibus contrahendis aetas contrahentium definita non est ut in matrimoniis. Quapropter et a primordio aetatis sponsalia effici possunt, si modo id fieri ab utraque persona intellegatur, id est, si non sint minores quam septem annis.

Paul. D. 23, 1, 7 In sponsalibus nihil interest, utrum testatio interponatur an aliquis sine scriptura spondeat. In sponsalibus etiam consensus eorum exigendus est, quorum in nuptiis desideratur. Intellegi tamen semper filiae patrem consentire, nisi evidenter dissentiat, Iulianus scribit.

Julian. D. 23, 1, 11 Sponsalia sicut nuptiae consensu contrahentium fiunt; et ideo sicut nuptiis, ita sponsalibus filiam familias consentire oportet.

Ulp. D. 23, 1, 12 Sed quae patris voluntati non repugnat, consentire intellegitur. Tunc autem solum dissentiendi a patre licentia filiae conceditur, si indignum moribus vel turpem sponsum ei pater eligat.

and *sponsa* (cf. Fr. *époux*, *épouse*) for the betrothed.

4. si non sint minores quam septem annis: in Roman law the capacity to act with full legal effect depends upon sex and age. The Romans recognized two ages of capacity, while we are accustomed to one only. In Roman terms, infancy and minority are not synonymous. Full capacity begins with *pubertas*, which was originally determined by physical development and afterward fixed by the jurists at fourteen for males and twelve for females. Those persons under the completed twelfth and fourteenth years respectively are *impuberes*. *Impuberes* are further divided into *infantes* (i.e. *qui fari non possunt*), children under seven years, and *infantia maiores*, children between the completed seventh and fourteenth years. The former are incapable of performing juristic acts; the latter act for themselves, but, except for their own benefit (*i.e.* by acquiring rights), only with the assistance of a guardian (*auctoritate tutoris*). *Maior aetas* begins with the completed twenty-fifth year (*puberes maiores vel minores XXV annis*). This distinction gained legal recognition as early as the time of Plautus (cf. *Pseud.*

Paul. D. 23, 1, 13 Filio familias dissentiente sponsalia nomine eius fieri non possunt.

Ulp. D. 23, 1, 18 In sponsalibus constituendis parvi refert, per se (et coram an per internuntium vel per epistulam) an per alium hoc factum est: et fere plerumque condiciones interpositis personis expediuntur.

Gai. D. 24, 2, 2, 2 In sponsalibus discutiendis placuit renuntiationem intervenire oportere; in qua re haec verba probata sunt: 'condicione tua non utor.'

Ulp. D. 23, 1, 10 In potestate manente filia pater sponso nuntium remittere potest et sponsalia dissolvere.

303) by a *lex Plaetoria* against defrauding minors. Toward the end of the republic the principle was developed by the praetor, who allowed a remedy to the minor defrauded on account of his inexperience (*restitutio in integrum propter minorem aetatem*), and by imperial legislation, which allowed the minor the protection of a *curator* (cf. note on *intra*, p. 117).

9. **condicione tua non utor**: 'I do not avail myself of your offer.' As the promise of marriage involves no legal obligation and no penalties, it may be renounced at will. These are the usual words employed in the breaking off of an engagement (*renuntiatio*), not in the dissolution of marriage, as given in Harper's *Lat. Dict.* s. v. *Condicio*, B. 1.

Dissolution of Marriage: marriage may be dissolved by necessity and voluntarily. By necessity, as when marriage comes to an end by some circumstance independent of the will: by death; by captivity, as when either spouse becomes a prisoner of war; by loss of freedom in other ways; by impediments to marriage which arise *ex post facto*, as when a father adopts his daughter's husband (*incestus superveniens*) or when the husband of a *libertina* becomes a senator. Voluntary dissolution of marriage arises by separation (*divortium*), *i.e.* by a discontinuance of the marriage relation with the intention of permanently dissolving the marriage. This may arise by agreement of husband and wife or by the voluntary renunciation of the marriage by either spouse (*divortium* followed by *repudium*). As marriage arises by consent, it may be dissolved voluntarily, since the prohibitions against divorce are very few in Roman law (cf. Gell. 10, 15, 23; D. 24, 2, 11). In the older law,

Dissolution of Marriage

Paul. D. 24, 2, 1 Dirimitur matrimonium divortio, morte, captivitate vel alia contingente servitute utrius eorum.

Tryph. D. 49, 15, 12, 4 Sed captivi uxor, tametsi maxime velit et in domo eius sit, non tamen in matrimonio est.

Pompon. D. 49, 15, 14, 1 Non ut pater filium, ita uxorem maritus iure postliminii recipit, sed consensu redintegratur matrimonium.

Julian. D. 24, 2, 6 Vxores eorum, qui in hostium potestate pervenerunt, possunt videri nuptarum locum retinere eo solo, quod alii temere nubere non possunt. Et generaliter definiendum est, donec certum est maritum vivere in captivitate constitutum, nullam habere licentiam

ceremonies in effecting divorce were required only in the case of marriage by *confarreatio*, which required a corresponding *diffarreatio*. Marriage by *coemptio* and probably by *usus* were dissolved by the usual *remancipatio* ('fictitious sale'), followed by *manumissio* on the part of the fictitious purchaser. Divorce during the republic was regulated more by custom and the corrective power of the censor than by law (cf. case of Sp. Carvilius Ruga, 234 B.C.). After Constantine, separation for insufficient cause or for guilt was punished by heavy fines (C. 5, 17, 8). By the law of Justinian, divorce was accomplished by informal methods, without judicial or clerical intervention.

1. **morte captivitate vel alia contingente servitute**: marriage with or without *manus* ceases at death, by captivity, and by any other loss of freedom of either spouse. For loss of freedom in other ways see note on *iure civili*, p. 80. By *postliminium* a captive citizen recovered all of his legal relations where he laid them down at the time of his capture, with the exception of marriage. The marriage contract must be renewed by agreement of the parties. It was enacted by law (perhaps the *lex Iulia et Papia Poppaea*) that captivity dissolved a marriage only when the life of the captive was despaired of and a period of five years had elapsed since capture.

2. **utrius**: for *alterutrius*, *utriusque*.

uxores eorum migrare ad aliud matrimonium, nisi mallent ipsae mulieres causam repudii praestare. Sin autem in incerto est, an vivus apud hostes teneatur vel morte praeventus, tunc, si quinquennium a tempore captivitatis excesserit, licentiam habet mulier ad alias migrare nuptias, ita tamen, ut bona gratia dissolutum videatur pristinum matrimonium et unusquisque suum ius habeat imminutum; eodem iure et in marito in civitate degente et uxore captiva observando.

Just. C. 5, 4, 14 Neque ab initio matrimonium contrahere neque dissociatum reconciliare quisquam cogi potest. Vnde intellegis liberam facultatem contrahendi atque distrahendi matrimonii transferri ad necessitatem non oportere.

Gai. D. 24, 2, 2 Divortium autem vel a diversitate mentium dictum est vel quia in diversas partes eunt, qui distrahunt matrimonium. In repudiis autem, id est renuntiatione, comprobata sunt haec verba: 'tuas res tibi habeto,' item haec: 'tuas res tibi agito.'

6. bona gratia dissolutum: a *divortium bona gratia* was a separation free from all disadvantages and penalties (*suum ius habeat*), when it occurred by agreement or for reasons attaching no blame to either party.

12. liberam facultatem contrahendi atque distrahendi: in the earlier law the *paterfamilias* could dissolve the marriage of his *filiafamilias* if she were not *in manu mariti*. Usually the consent of a *paterfamilias* was unnecessary. M. Aurelius forbade his interference except for serious reasons (*magna et iusta causa*), and later emperors advanced the view of the text. A wife *in manu* could not, of course, divorce herself (*invitam autem ad maritum redire nulla iuris praecepit constitutio*, C. 5, 17, 5).

15. Divortium . . . In repudiis: there is no contrast here between *divortium* and *repudium* (as given s. v. *divortium* in Harper's *Lat. Dict.*). *Divortium* is the general term for the separation from a marriage. *Repudium* is the declaration or formal notice (*renuntiatio*) given by one party to the

Paul. D. 24, 2, 3 Divortium non est nisi verum, quod animo perpetuam constituendi dissensionem fit. Itaque quidquid in calore iracundiae vel fit vel dicitur, non prius ratum est, quam si perseverantia apparuit iudicium animi fuisse : ideoque per calorem misso repudio, si brevi reversa uxor est nec divortisse videtur.

Paul. D. 24, 2, 9 Nullum divortium ratum est nisi septem civibus Romanis puberibus adhibitis praeter libertum eius qui divortium faciet.

other, of which the usual words of style are '*tuas res habeto*,' etc. The prevailing opinion is that *divortium* is a separation by agreement; *repudium*, a separation by compulsion or withdrawal of consent on one side only (repudiation). This view seems untenable from the sources. It appears as more likely that *divortium* is a term denoting a separation of any kind, whether by agreement or by the application of one party only, while *repudium* denotes the formal declaration of will and intention of either party seeking a dissolution of marriage (cf. Sohm, *Institutionen*, 8th ed., 1899, p. 453). The mere agreement to separate did not dissolve the marriage, but agreement followed by the declaration (*repudium mittere, dare*) sent or given by one of the parties.

1. **Divortium non est nisi verum** : 'a divorce is ineffectual unless there be a serious intention of making the separation permanent.'

7. **Nullum divortium nisi septem civibus Romanis** : the *lex Iulia de adulteriis* (18 B.C.) introduced this formality under penalty, in order to establish clear proof of the intention of the parties. This continued to be the law under the empire, although Diocletian required the declaration to be in writing (*repudii libellus*).

8. **praeter libertum** : why a *libertus* of the one applying for a separation should be present as a witness is not known. It has been suggested, in the absence of a better explanation, that it was a prerogative of the higher classes in divorce proceedings, since they alone possessed freedmen (Leonhard). It is furthermore possible that the freedman is a remnant and reminiscence of the old family council of the republic (*iudicium domesticum*).

Manvs

Gai. 1, 109

Sed in potestate quidem et masculi et feminae esse solent; in manum autem feminae tantum conveniunt. Olim itaque tribus modis in manum conveniebant, usu, farreo, coemptione.

Farreo in manum conveniunt per quoddam genus sacrificii, quod Iovi Farreo fit in quo farreus panis adhibetur, unde etiam confarreatio dicitur: complura praeterea huius

Manus: *manus* is the technical term for the power of the husband over his wife. The wife *in manu* was called *materfamilias* (not to be confused with a woman *sui iuris*, cf. D. 1, 6, 4, and note on *Definition*, p. 104); the wife *sine manu* was called simply *uxor* (Cic. *Top.* 3, 14). Originally every *iustum matrimonium* carried with it *manus*; later *manus* became independent of marriage and arose only through an especial act as an accessory of marriage. In this way *manus* was fictitiously employed in other relations than those of marriage, so that the woman passed temporarily into the *manus* of even a third party. *Manus matrimonii causa* came into disfavor toward the time of Cicero (Cic. *pro Mur.* 12) and occurred but seldom during the earlier empire; *manus* as a fiction, however, continued longer and was an institution of the classical law. The legal position of the wife *in manu* was as follows: (*a*) she passed entirely out of her family into the family of her husband, to whom she stood in the position of a daughter (*quasi filiafamilias, filiae loco*), and to her own children, who were in *patria potestas*, she was in the position of sister (*sororis loco*); (*b*) her entire property became her husband's and all that she acquired after marriage (*per eas personas, quas in manu mancipiove habemus, proprietas quidem adquiritur nobis ex omnibus causis, sicut per eos qui in potestate nostra sunt*, Gai. 2, 90); for her previously contracted debts her husband was responsible up to the extent of her property (*missio in bona* of her creditors).

3. **Olim tribus modis in manum conveniebant**: *manus* had become practically obsolete in the time of Gaius and had vanished entirely from the law of Justinian. Along with the change in manners and social life during the last century and a half of the republic, women preferred the more independent

iuris ordinandi gratia cum certis et sollemnibus verbis, praesentibus decem testibus, aguntur et fiunt. Quod ius etiam nostris temporibus in usu est; nam flamines maiores, id est Diales, Martiales, Quirinales, item reges sacrorum nisi ex farreatis nati sunt, non leguntur; ac ne ipsi quidem sine confarreatione sacerdotium habere possunt.

Coemptione vero in manum conveniunt per mancipationem, id est per quandam imaginariam venditionem;

position afforded by marriage without *manus* along with the freedom of divorce, independent property, etc., which it granted.

1. **sollemnibus verbis:** the power of the husband over his wife was derived from a union of their respective sacred rites, symbolized by a ceremony in which the woman was introduced into the religious worship of her husband. The words of the ceremony (*certa verba*, *sollemnia*) were '*Vbi tu es Gaius, ibi ego sum Gaia*,' spoken by the woman.

2. **Quod ius nostris temporibus in usu est:** *confarreatio* made the issue of the marriage eligible for certain high priestly offices (*flamen maior*, *rex sacrorum*, *virgo vestalis*) and, as it was the most ceremonious and aristocratic form of marriage, it was the prerogative of the patricians only. Augustus renewed the priesthood of Jove (10 B.C.), and by a law of Tiberius, marriage by *confarreatio* with a *flamen Dialis* produced *manus* with regard to sacred rites only. In other respects the wife retained the rights of an *uxor sine manu*.

7. **Coemptione in manum conveniunt:** marriage by the secular *coemptio* was accessible to all citizens, plebeians as well as patricians. The primitive bride purchase took in Roman law the form of *mancipatio*, originally a formal proceeding *per aes et libram*, but eventually a fictitious sale in which the daughter was purchased from her *paterfamilias* and later a transaction in which the bride sold herself (*auctoritate tutoris*) *in manum mariti*. Two forms of *coemptio* occur: *coemptio matrimonii causa* and *coemptio fiduciae causa*. The latter was a fiction whereby women might avoid certain legal restrictions and disabilities (*e.g. coemptio tutelae evitandae causa*, *testamenti faciendi causa*, etc.). In these *coemptiones* the wife trusted (*fiducia*) that the sham husband would not take the marriage seriously, but would immediately set her free from *manus* by remancipation. For greater security old men were selected for these 'dummy' husbands,

nam adhibitis non minus quam quinque testibus civibus Romanis puberibus, item libripende, emit is mulierem, cuius in manum convenit.

Vsu in manum conveniebat, quae anno continuo nupta perseverabat; quia enim veluti annua possessione usucapiebatur, in familiam viri transibat filiaeque locum obtinebat. Itaque lege duodecim tabularum cautum est, ut si qua nollet eo modo in manum mariti convenire, ea quotannis trinoctio abesset atque eo modo usum cuiusque anni interrumperet. Sed hoc totum ius partim legibus sublatum est, partim ipsa desuetudine oblitteratum est.

Patria Potestas

Gai. 1, 48

Quaedam personae sui iuris sunt, quaedam alieno iuri sunt subiectae. Rursus earum personarum, quae alieno iuri subiectae sunt, aliae in potestate,

at the most, merely short-lived purchasers of the marital power (*senes coemptionales*, cf. Cic. *pro Mur.* 12, 27).

4. **Vsu in manum conveniebat**: just as *manus* could be acquired by bride purchase, so could it be acquired, like power over other pieces of property, by prescriptive title. By *usucapio* under the old *ius civile*, immovable property was acquired in two years; everything else in one year. The daughter of a stranger (*peregrinus*), therefore, over whom *manus* could not be acquired by *confarreatio* or *coemptio* might pass into the power of her husband by *usus*. From *manus* derived in this way arose all the other rights of a *iustum matrimonium*. According to the Twelve Tables, *manus* acquired by dwelling together *matrimonii causa* for one year might be avoided by the absence (*usurpatio*) of the wife from the marital roof for three consecutive nights (*quotannis trinoctio*). By this symbolical interruption of the continuity of the marital power it is evident that as early as the Twelve Tables there could be a marriage without *manus* (*iure civili*), and eventually *usus* no longer produced *manus*, and the institution became obsolete (*ius desuetudine oblitteratum est*).

Patria Potestas: *patria potestas* is the relation of the *paterfamilias*

aliae in manu, aliae in mancipio sunt. Videamus nunc de his, quae alieno iuri subiectae sint; nam si cognoverimus, quae istae personae sint, simul intellegemus, quae sui iuris sint. Ac prius dispiciamus de iis qui in aliena potestate sunt.

with his *filiifamilias* (and *filiaefamilias*), whether they are subjected to his power by birth from a lawful marriage (*liberi, filii legitimi*), or by the fiction of legitimation and adoption. The paternal authority of a Roman citizen over his children is a peculiar characteristic of the law of status. *Patria potestas* is analogous to *dominica potestas* in its severity and scope, but the *filiifamilias* differ from those subjected to *dominica potestas* in that they are free and citizens, possessing the private rights of *commercium* and *conubium*. They are furthermore capable of becoming independent persons with full legal capacity and having the *ius potestatis* themselves as soon as the *patria potestas* over them ceases (*sui iuris*). All rights accrue to the *paterfamilias*, so that the *filiusfamilias* has no *potestas* over his own children while he is under the power of his own father. In other words, the rights growing out of the *ius conubii* and *commercii* are centered in the *paterfamilias*. As regards the public rights of a *filiusfamilias*, see note on *Filius*, p. 132. With regard to the person of the *filiusfamilias*, the *paterfamilias* possesses the following rights: originally the unlimited power of life and death (*vitae necisque potestas*, especially with the approval of a domestic tribunal); the right of sale (*ius vendendi*), either into slavery (*trans Tiberim*) or to a Roman citizen (*mancipatio*), afterward limited to fictitious sale, and sale by reason of father's poverty (*propter nimiam paupertatem*); the right of surrender to the injured party for delicts, in lieu of pecuniary damages (*ex maleficiis, ex noxali causa mancipio datur*). Cf. note on *iudicium*, p. 240.

1. **aliae in mancipio**: the old law recognized the rights of parents to sell their children into bondage. The relationship created by such a sale was one of master and bondman. The bondman was in an intermediate status between freedom and slavery, occupying the position of a slave as regards his master, but in other relations he was regarded as *liber* and *civis*. The phrase *in mancipio esse* means to be in a position analogous to that of slave. The right of parents to sell their children was later restricted, and eventually such sales were punishable as disgraceful and unlawful acts. Fictitious sales

In potestate nostra sunt liberi nostri, quos iustis nuptiis procreavimus. Quod ius proprium civium Romanorum est; fere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus. Idque divus Hadrianus edicto, quod proposuit de his, qui sibi liberisque suis ab eo civitatem Romanam petebant, significavit. Nec me praeterit Galatarum gentem credere in potestate parentum liberos esse.

Ulp. D. 1, 6, 4

Nam civium Romanorum quidam sunt patres familiarum, alii filii familiarum, quaedam matres familiarum, quaedam filiae familiarum. Patres familiarum sunt, qui sunt suae potestatis sive puberes sive impuberes; simili modo matres familiarum; filii familiarum et filiae quae sunt in aliena potestate. Nam qui ex me et uxore mea nascitur, in mea potestate est; item qui ex filio meo et uxore eius nascitur, id est nepos meus et neptis, aeque in mea sunt potestate, et pronepos et proneptis et deinceps ceteri.

Ulp. 10, 2

Morte patris filius et filia sui iuris fiunt; morte autem avi nepotes ita demum sui iuris fiunt, si post mortem avi in potestate patris futuri non sunt, velut

continued to be used in adoptions and emancipations.

1. **In potestate nostra sunt liberi**: the natural basis of *patria potestas* is birth (*liberi ex iusto matrimonio*). *Potestas* could be acquired over *liberi naturales* (*non legitimi*) by legitimation, which might be effected, under the Christian emperors, by the subsequent marriage of parents eligible to marriage, or by a rescript of the emperor, etc. (*legitimatio per subsequens matrimonium, per rescriptum principis*).

7. **Galatarum gentem**: the Galatians were of Gallic origin, and Caesar (*B. G.* 6, 19) testifies to an institution like the Roman *patria potestas* among the Gauls. St. Paul refers also to this peculiarity of the Galatians (Gal. 4, 1).

19. **Morte patris filius et filia sui iuris fiunt**: *patria potestas* might cease for various reasons, but neither marriage nor the attain-

si moriente avo pater eorum aut iam decessit aut de potestate dimissus est; nam si mortis avi tempore pater eorum in potestate eius sit, mortuo avo in patris sui potestate fiunt.

Si patri vel filio aqua et igni interdictum sit, patria potestas tollitur, quia peregrinus fit is, cui aqua et igni interdictum est; neque autem peregrinus civem Romanum neque civis Romanus peregrinum in potestate habere potest.

Si pater ab hostibus captus sit, quamvis servus hostium fiat, tamen cum reversus fuerit, omnia pristina iura recipit iure postliminii. Sed quamdiu apud hostes est, patria potestas in filio eius interim pendebit, et cum reversus fuerit ab hostibus, in potestate filium habebit; si vero ibi decesserit, sui iuris filius erit. Filius quoque si captus fuerit ab hostibus, similiter propter ius postliminii patria potestas interim pendebit.

In potestate parentum esse desinunt et hi qui flamines Diales inaugurantur et quae virgines Vestae capiuntur.

Inst. 1, 12, 3

Poenae servus effectus filios in potestate habere desinit. Servi autem poenae efficiuntur, qui in metellum damnantur et qui bestiis subiciuntur.

ment of majority relieved a son from paternal authority at Rome. *Patria potestas* terminated of necessity: by death of *paterfamilias*, though grandchildren then pass into the power of their father if he is alive (otherwise they become *sui iuris*); by loss of freedom or citizenship of either *paterfamilias* or *filiusfamilias* (subject to *ius postliminii*); by assumption of certain offices on the part of those subjected to power, as *flamen Dialis* or *virgo vestalis* in the older law, or the office of bishop or rank of *patricius* in the law of Justinian. *Patria potestas* terminated of free will: by emancipation (also by *datio in adoptionem* and by *in manum conventio*) occurring, according to the Twelve Tables and the classical law, by *mancipatio* followed by *manumissio;* by rescript in the imperial law; and by declaration before a court in the law of Justinian.

Filius familias si militaverit, vel si senator vel consul fuerit factus, manet in patris potestate. Militia enim vel consularia dignitas patris potestate filium non liberat. Sed ex constitutione nostra summa patriciatus dignitas ilico ab imperialibus codicillis praestitis a patria potestate liberat.

Gai. 1, 132

Praeterea emancipatione desinunt liberi in potestate parentum esse. Sed filius quidem tribus mancipationibus, ceteri vero liberi sive masculini sexus sive feminini una mancipatione exeunt de parentum potestate; lex enim XII tabularum tantum in persona filii de tribus mancipationibus loquitur his verbis 'si pater filium ter venum duit, a patre filius liber esto.' Eaque res ita agitur: mancipat pater filium alicui; is eum vindicta manumittit; eo facto revertitur in potestatem patris; is eum iterum mancipat vel eidem vel alii (sed in usu est eidem mancipari) isque eum postea similiter vindicta manumittit; eo facto rursus in potestatem patris revertitur; tertio pater eum mancipat vel eidem vel alii (sed hoc in usu est, ut eidem mancipetur), eaque mancipatione desinit in potestate patris esse, etiamsi nondum manumissus sit sed adhuc in causa mancipii.

Inst. 1, 12, 6

Sed ea emancipatio antea quidem vel per antiquam legis observationem procedebat, quae per imaginarias venditiones et intercedentes manumissiones celebrabatur, vel ex imperiali rescripto. Nostra autem providentia et hoc in melius per constitutionem reformavit, ut fictione pristina explosa recta via apud competentes iudices vel magistratus parentes intrent et filios

4. **summa patriciatus dignitas**: the term *patricius* was changed by Constantine to a title of nobility in imitation of the old patriciate arising from birth. It was henceforth a title conferred at the pleas-

suos vel filias vel nepotes vel neptes ac deinceps sua manu dimitterent.

Gai. D. 1, 7, 28 Liberum arbitrium est ei, qui filium et ex eo nepotem in potestate habebit, filium quidem potestate demittere, nepotem vero in potestate retinere; vel ex diverso filium quidem in potestate retinere, nepotem vero manumittere; vel omnes sui iuris efficere.

Marcian. D. 1, 7, 31 Non potest filius, qui est in potestate patris, ullo modo compellere eum, ne sit in potestate, sive naturalis sive adoptivus.

Pompon. D. 1, 6, 9 Filius familias in publicis causis loco patris familias habetur, veluti ut magistratum gerat, ut tutor detur.

Adoption

Ulp. 8, 1 Non tantum naturales liberi in potestate parentum sunt, sed etiam adoptivi.

Modest. D. 1, 7, 1 Filios familias non solum natura, verum et adoptiones faciunt. Quod adoptionis nomen est quidem generale, in duas autem species dividitur,

ure of the emperor on the highest and most esteemed personages of the imperial court.

11. **Filius familias in publicis causis**: *patria potestas* did not apply in the sphere of public law. The *filiusfamilias*, regardless of paternal authority, had the two public rights, *ius honorum* and *ius suffragii*. He could exercise all political functions and hold the highest political offices without release from *patria potestas* and with no prejudice to his public authority. He might officiate as judge in a suit to which his father was a party or even preside over his own adoption or emancipation. He might, though still under power himself, be appointed to fill the public office of guardian over another (*quod ad ius publicum attinet, non sequitur ius potestatis*, D. 36, 1, 14).

Adoption: adopted persons may be subjected to *patria potestas* as well as those belonging to the family by birth. The transaction by which one person is rendered subordinate to another, taking the

quarum altera adoptio similiter dicitur, altera adrogatio. Adoptantur filii familias, adrogantur qui sui iuris sunt.

Inst. 1, 11, 8

In plurimis autem causis adsimilatur is, qui adoptatus vel adrogatus est, ei qui ex legitimo matrimonio natus est. Et ideo si quis per imperatorem sive apud praetorem vel apud praesidem provinciae non extraneum adoptaverit, potest eundem alii in adoptionem dare. Sed et illud utriusque adoptionis commune est, quod et hi, qui generare non possunt, quales sunt spadones, adoptare possunt, castrati autem non possunt. Feminae

position of son, grandson, etc., is called adoption. Of adoption there are two kinds: *adoptio* and *arrogatio*. *Adoptio*, in the specific sense, is the name given to the transaction by which a *persona alieni iuris* (*filiusfamilias*) is transferred from the power of one *paterfamilias* to another; *arrogatio* is the name of the transaction by which a *persona sui iuris* (*paterfamilias*) is subjected to the power of another. In the old law, adoption of a son required that he be emancipated three times by his father and that he be transferred to the power of the adoptive father (*vindicatio in patriam potestatem*). See also note on *qui*, p. 105. In the later law, adoption was effected before the proper court in the presence of the parties, and in the law of Justinian it was complete only when the one adopting was an ascendant of the one adopted (called *adoptio plena*).

6. **non extraneum**: an *extraneus* is one not related by a family tie; here *non extraneum* means *a descendant*. Under the law of Justinian the adoption of a stranger (*extraneus*) did not confer *patria potestas* or any other rights over the one adopted (called *adoptio minus plena*), hence he could not be given in adoption to still another person. The one adopted, however, obtained rights of inheritance *ab intestato* in the estate of his adoptive parent.

9. **qui generare non possunt**: there were certain requirements which must be observed in cases of adoption: the adoptive parent must be capable of exercising *patria potestas* and he must be eligible to marriage; he must also be one generation (eighteen years) older than the one adopted; the parties concerned must consent. As adoption imitates nature, only those capable of marriage (though not necessarily married) could

quoque adoptare non possunt, quia nec naturales liberos in potestate sua habent; sed ex indulgentia principis ad solatium liberorum amissorum adoptare possunt.

Paul. D. 1, 7, 30 Et qui uxores non habent filios adoptare possunt.

Inst. 1, 11, 4 Minorem natu non posse maiorem adoptare placet: adoptio enim naturam imitatur et pro monstro est, ut maior sit filius quam pater. Debet itaque is, qui sibi per adrogationem vel adoptionem filium facit, plena pubertate, id est decem et octo annis praecedere. Licet autem et in locum nepotis vel neptis vel in locum pronepotis vel proneptis vel deinceps adoptare, quamvis filium quis non habeat. Et tam filium alienum quis in locum nepotis potest adoptare, quam nepotem in locum filii.

Paul. D. 1, 7, 6 Cum nepos adoptatur quasi ex filio natus, consensus filii exigitur, idque etiam Iulianus scribit.

adopt. *Spadones* could marry; *castrati* could not marry. The possibility of *spadones* having children was not entirely disregarded (*nec ei corporale vitium impedimento est*, D. 1, 7, 40).

2. **ad solatium liberorum amissorum adoptare possunt**: women could not adopt because they did not have the *patria potestas*, but the emperor Diocletian enacted that a mother might adopt for the reason stated in the text (C. 8, 47, 5). This was not a complete adoption, but the adopted child was placed in a position similar to that of the mother's own child, with reciprocal rights of inheritance *ab intestato*.

10. **plena pubertate praecedere**: although the age of puberty was fixed in the classical law at fourteen, it was agreed by jurists that in some cases the age should be placed later to include those of retarded physical development. The age accepted as sufficient for adoption and certain other acts was eighteen (*plena pubertas*). An interval of eighteen years was therefore required between the ages of the adoptive father and son.

15. **consensus filii exigitur**: the consent of a son was required for the same reason in adoption as that of a father in marriage (cf. note on *consensum*, p. 111). A grandson (C) might be adopted in a general

Inst. 1, 11, 7 In eo casu et filius consentire debet, ne ei invito suus heres adgnascatur. Sed ex contrario si avus ex filio nepotem dat in adoptionem, non est necesse filium consentire.

Arrogation

Gai. 1, 99 Populi auctoritate adoptamus eos, qui sui iuris sunt; quae species adoptionis dicitur adrogatio, quia et is qui adoptat rogatur, id est interrogatur, an velit eum, quem adoptaturus sit, iustum sibi filium esse; et is, qui adoptatur, rogatur, an id fieri patiatur; et populus rogatur,

way, or as the son of a particular son (B), who might be still living, or deceased. If a grandson (C) were adopted as the son of a particular son (B) of the adopting grandfather (*paterfamilias*), it would happen, at the death of the grandfather (A), that the adopted one (C) would pass into the power of this particular son (B) and become one of his agnatic heirs. Hence without this provision the son's (B's) heirs would be increased without his consent. A grandson adopted in a general way would become *sui iuris* at the death of his adoptive grandfather.

Arrogation: in the early law arrogation was accomplished by a *rogatio populi in comitiis calatis* (*lex curiata*) with the coöperation of the pontiffs, who watched over the religious interests involved. The transaction by which a *homo sui iuris* became *alieni iuris* might involve not only the extinction of a family, but also that of a *gens*. Arrogation was, therefore, a matter of concern to the state, and it always remained an institution governed by public law. Procedure in the matter of arrogation before the *comitia curiata* was similar to that of other formal transactions before this body (for the formula see Gell. 5, 19, 9. Cf. also note on *latam*, p. 46). Only those could be arrogated who were qualified to appear in the *comitia curiata*; women and *impuberes* were, therefore, excluded. In the empire, arrogation was performed by *rescriptum principis* (*auctoritate principis*), the will of the emperor supplanting the former *auctoritas populi*. Antoninus Pius allowed *impuberes* to be arrogated in certain cases, but only when provision had been previously made for the protection of their interests.

an id fieri iubeat. Imperio magistratus adoptamus eos, qui in potestate parentum sunt, sive primum gradum liberorum obtineant, qualis est filius et filia, sive inferiorem, qualis est nepos neptis, pronepos proneptis. Et quidem illa adoptio, quae per populum fit, nusquam nisi Romae fit; at haec etiam in provinciis apud praesides earum fieri solet.

Ulp. D. 1, 7, 15 Si pater familias adoptatus sit, omnia quae eius fuerunt et adquiri possunt tacito iure ad eum transeunt qui adoptavit.

Capitis Deminvtio

Paul. D. 4, 5, 11 Capitis deminutionis tria genera sunt, maxima, media, minima: tria enim sunt quae habemus, libertatem, civitatem, familiam. Igitur cum omnia haec

5. illa adoptio: *i.e. arrogatio* (*adoptio hominis sui iuris*). — **at haec**: *i.e. adoptio* (*adoptio hominis alieni iuris*).

Capitis Deminutio: the legal capacity of persons depended upon their civil position. Certain members of Roman society were legally disqualified, while others enjoyed varying degrees of legal capacity, according to their position with reference to liberty, citizenship, and domestic relations. Only those persons who were free Roman citizens and independent members of a *familia* were capable of enjoying all the rights conferred by the law. The legal capacity of the individual is designated as *caput*. *Caput* depends upon the civil position of the individual with reference to *libertas*, *civitas*, and *familia*. Any alteration in the position of a *civis Romanus* with reference to any of these three relations will cause a loss of his previous personality (*capitis deminutio*), *i.e.* civil death of previous personality (*quia civili ratione capitis deminutio morti coaequatur*, Gai. 3, 153). As *libertas* is requisite for *civitas* and *familia*, its loss is called *capitis deminutio maxima* (*servus nullum caput habet*); *civitas* being required for *familia*, its loss is called *media* or *minor*; any change in domestic position (*familia*) is called *minima*. The loss of the higher degree involves the loss of the lower.

amittimus, hoc est libertatem et civitatem et familiam, maximam esse capitis deminutionem: cum vero amittimus civitatem, libertatem retinemus, mediam esse capitis deminutionem: cum et libertas et civitas retinetur, familia tantum mutatur, minimam esse capitis deminutionem constat.

Gai. 1, 159

Est autem capitis deminutio prioris status permutatio. Eaque tribus modis accidit: nam aut maxima est capitis deminutio, aut minor, quam quidam mediam vocant, aut minima. Maxima est capitis deminutio, cum aliquis simul et civitatem et libertatem amittit; minor sive media est capitis deminutio, cum civitas amittitur, libertas retinetur; quod accidit ei cui aqua et igni interdictum fuerit; minima est capitis deminutio, cum et civitas et libertas retinetur, sed status hominis commutatur; quod accidit in his, qui adoptantur, item in his, quae

10. **Maxima est capitis deminutio**: *capitis deminutio maxima* occurs when a *civis Romanus* loses his *libertas*, *e.g.* by captivity (subject to *postliminium*, see note on the word, p. 85); by sale *trans Tiberim* as slave; by sale *pretii participandi causa*; by condemnation to death, to the mines, etc.; by *revocatio in servitutem* of *libertus ingratus*, etc. Cf. also note on *iure*, p. 80.

12. **minor capitis deminutio**: *capitis deminutio minor* occurs when a citizen loses his citizenship, *e.g.* by banishment because of the *interdictio aquae et ignis*; by *deportatio* in the empire; by emigration to a Latin colony or a foreign state; by desertion of a soldier to the enemy; by surrender of a guilty person to the enemy for injury to their ambassadors, or for making a treaty not sanctioned by the Roman people, etc.

14. **minima est capitis deminutio**: *minima capitis deminutio* occurs when a citizen exchanges one *caput* for another by any loss or change of position in *familia*, whether he increases or diminishes his personal independence, *e.g.* when a *homo sui iuris* becomes *alieni iuris* (*e.g.* by *arrogatio* or *in manum conventio* of a woman *sui iuris*); when a *homo alieni iuris* becomes *sui iuris* (by emancipation from *patria potestas* or from a marriage *cum manu mariti*); when a *homo*

coemptionem faciunt, et in his, qui mancipio dantur quique ex mancipatione manumittuntur; adeo quidem, ut quotiens quisque mancipetur aut manumittatur, totiens capite deminuatur.

Ulp. D. 17, 2, 63, 10

Intereunt autem homines quidem maxima aut media capitis deminutione aut morte.

Ulp. D. 4, 5, 6

Capitis enim minutio privata hominis et familiae eius iura, non civitatis amittit.

Inst. 1, 16, 1

Maxima est capitis deminutio, cum aliquis simul et civitatem et libertatem amittit. Quod accidit in his, qui servi poenae efficiuntur atrocitate sententiae, vel liberti ut ingrati circa patronos condemnati, vel qui ad pretium participandum se venumdari passi sunt. Minor sive media est capitis deminutio, cum civitas quidem amittitur, libertas vero retinetur. Quod accidit ei, cui aqua et igni interdictum fuerit, vel ei, qui in insulam deportatus est. Minima est capitis deminutio, cum et civitas et libertas retinetur, sed status hominis commutatur. Quod accidit in his, qui, cum sui iuris fuerunt, coeperunt alieno iuri subiecti esse, vel contra. Servus autem manumissus capite non minuitur, quia nullum caput habuit.

alieni iuris changes *paterfamilias* (by *adoptio*, by *in manum conventio* of a *filiafamilias*, by *arrogatio* of a *homo sui iuris* who has children in his *potestas*, by *manumissio e mancipio*, etc.).

5. **Intereunt homines**: by the two greater changes in status (*libertas* and *civitas*, called also together, *capitis deminutio magna*) the individual suffers civil death, but by the least of the changes in status (*familia*) he exchanges his former person for a new person and, therefore, lays down the rights and duties of his former personality. In the eye of the private law, he suffers civil death followed by *an immediate resurrection*; but in the eye of the public law, his personality remains unaltered and he suffers no loss of public rights (*iura civitatis non amittit*). See also note on *Filius*, p. 132.

7. **Capitis enim minutio privata**: with *minutio* sc. *minima*. The

Guardianship

Inst. 1, 13

Transeamus nunc ad aliam divisionem. Nam ex his personis, quae in potestate non sunt, quaedam vel in tutela sunt vel in curatione, quaedam neutro iure tenentur. Videamus igitur de his, quae in tutela vel in curatione sunt; ita enim intellegemus ceteras personas, quae neutro iure tenentur. Ac prius dispiciamus de his quae in tutela sunt. Est autem tutela, ut Servius definivit, ius ac potestas in capite libero ad tuendum eum, qui propter aetatem se defendere nequit, iure civili data ac

forms *deminutio*, *diminutio*, and *minutio* were all in common use.

Guardianship: guardianship (*tutela*, *cura*, *curatio*) is an institution whereby the legal capacity of those persons *sui iuris* who are wholly or partially incapable of performing legal acts on account of immature years, mental incapacity, or business inexperience, is completed and protection is afforded such incompetent persons in the exercise of their legal rights. Guardianship applies only to *personae sui iuris*. Not all *personae sui iuris* are capable of independent action. Persons may become *sui iuris* irrespective of age or sex and still be absolutely incapable of performing legal acts (*e.g. infantes*), or they may be only partially capable of such action (*e.g. infantia maiores*), or they may be capable but lack sufficient judgment and experience (*e.g. minores XXV annis*). The Roman law therefore developed three kinds of guardianship, according to the degree of incapacity of the ward and the degree of authority conferred upon the guardian, viz.: *tutela impuberum*, *tutela mulierum*, *cura* (*curatio*) *puberum*. *Personae alieni iuris* required no guardian because they were already subordinated to the power and protection of another (*in potestate*, *in manu*, *in mancipio*).

8. ius ac potestas in capite libero: *in capite libero* is equivalent to *persona sui iuris*. The principle at the basis of guardianship was twofold. In the earlier law, guardianship (*tutela*) was a private right (*ius ac potestas*), analogous to *patria potestas* and a substitute for it, exercised by those persons most interested in the protection of the ward's person and property (Gell. 5, 13). Later, guardianship was transformed into a public office, whose acceptance was obligatory

permissa. Tutores autem sunt, quae eam vim ac potestatem habent, ex qua re ipsa nomen ceperunt. Itaque appellantur tutores quasi tuitores atque defensores, sicut aeditui dicuntur qui aedes tuentur.

Gai. I, 189 Sed impuberes quidem in tutela esse omnium civitatium iure contingit, quis id naturali rationi conveniens est, ut is qui perfectae aetatis non sit, alterius tutela regatur. Nec fere ulla civitas est, in qua non licet parentibus liberis suis impuberibus testamento tutorem dare; quamvis, ut supra diximus, soli cives Romani videantur liberos suos in potestate habere.

Ulp. II, 1 Tutores constituuntur tam masculis quam feminis. Sed masculis quidem impuberibus dumtaxat propter aetatis infirmitatem, feminis autem tam impuberibus quam puberibus, et propter sexus infirmitatem et propter forensium rerum ignorantiam.

Inst. I, 23 Masculi puberes et feminae viripotentes usque ad vicesimum quintum annum completum curatores accipiunt; qui, licet puberes sint, adhuc tamen huius aetatis sunt, ut negotia sua tueri non possint.

(*nam et tutelam et curam placuit publicum munus esse*) and whose conduct was a public duty (*onus*).

10. **ut supra diximus**: cf. text and note on *Galatarum*, p. 129.

15. **propter sexus infirmitatem**: for the lifelong tutelage of women see text and note on *Veteres*, p. 152.

17. **Masculi puberes ad vicesimum quintum annum curatores accipiunt**: the earliest known provision for the guardianship of *puberes*, not otherwise disqualified (*e.g. furiosi, prodigi*), is the *lex Plaetoria* (about 204 B.C.). By this law full majority (*perfecta aetas, legitima aetas*) was fixed at twenty-five (hence the distinction *maiores, minores XXV annis*), and any fraud practiced upon those under this age in the conclusion of contracts (*circumscriptio adulescentium*) subjected the guilty person to criminal prosecution and the injured minor was granted a remedy (*exceptio legis Plaetoriae*). Cf. also note on *si non*, p. 120.

Inst. 1, 14, 4 Certae autem rei vel causae tutor dari non potest, quia personae, non causae vel rei datur.

Inst. 1, 23, 2 Item inviti adulescentes curatores non accipiunt praeterquam in litem; curator enim et ad certam causam dari potest.

Inst. 1, 14 Dari autem potest tutor non solum pater familias, sed etiam filius familias. Sed et servus proprius testamento cum libertate recte tutor dari potest. Sed sciendum est eum et sine libertate tutorem datum tacite et libertatem directam accepisse videri et per hoc recte tutorem esse.

2. quia personae, non causae datur: the chief distinction between *tutela* and *cura* appears in the relation of *tutores* and *curatores* to the property of their respective wards: *tutores* represent constantly the personality of their wards in all proprietary relations (*tutor ad universum patrimonium datus esse creditur*, Inst. 1, 25, 17). Additional *tutores* or *curatores* may be appointed for a single transaction or for a special purpose only (*e.g. ad litem*). The essence of *tutela* is the duty of supplying the deficiency in the ward's capacity to perform legal acts; this is called the *auctoritatis interpositio* (*auctoritas*, *augere* in legal Latin means 'the supplying of some deficiency'), the tutor cured (*augebat*) the inability of his *pupillus* to understand the meaning of legal transactions. The essence of *cura* was the administration of property (*gestio*, *administratio*) and, though in some cases the *curator* was concerned with the personal welfare of his ward, he was in the main charged with the duty of preventing pecuniary damage or loss to him. In this sense the maxim, *tutor personae datur*, *curator rei*, is true, but not as commonly stated, that the *tutor* is given to the person of the pupil and the curator to the management of his property (*e.g.* Harper's *Lat. Dict.* s. v. *tutor*). The *tutor* may have the *gestio* of his pupil's property, as in *tutela impuberum*; or he may lack it, as in *tutela mulierum*; to the office of *curator*, however, *gestio* is essential.

6. Dari potest tutor non solum pater familias, sed filius familias: under the older law the only qualifications for the office of *tutor* were citizenship and male sex. Those incapable of conducting the office because of immaturity or physical and mental infirmities

Gai. D. 26, 1, 16 Tutela plerumque virile officium est. Et sciendum est nullam tutelam hereditario iure ad alium transire; sed ad liberos virilis sexus perfectae aetatis descendunt legitimae, ceterae non descendunt.

Nerat. D. 26, 1, 18 Feminae tutores dari non possunt, quia id munus masculorum est, nisi a principe filiorum tutelam specialiter postulent.

Inst. 1, 25, 13 Minores autem viginti et quinque annis olim quidem excusabantur; a nostra autem constitutione prohibentur ad tutelam vel curam aspirare, adeo ut nec excusatione opus fiat. Qua constitutione cavetur, ut nec pupillus ad legitimam tutelam vocetur nec adultus; cum erat incivile eos, qui alieno auxilio in rebus suis administrandis egere noscuntur et sub aliis reguntur, aliorum tutelam vel curam subire.

Idem et in milite observandum est, ut nec volens ad tutelae munus admittatur.

Paul. D. 26, 1, 17 Complura senatus consulta facta sunt, ut in locum furiosi et muti et surdi tutoris alii tutores dentur.

could be represented by a substitute. Even a slave could be appointed by testament, but in the absence of express gift of liberty, he was held to receive his freedom by implication (*tacite et libertatem directam*) and hence could act as *tutor* (cf. note on *Testamento*, p. 91 also). For the *filiusfamilias* as *tutor*, cf. note on *Filius*, p. 132. In the later law and in the law of Justinian, *impuberes*, *minores*, soldiers, and bishops were disqualified, but women might in some cases of near relationship hold the office (*a principe filiorum tutelam specialiter postulent*).

3. **perfectae aetatis**: for explanation see note on *Masculi*, p. 140.

12. **pupillus nec adultus**: the definitions of *pupillus*, *adultus*, and *tutor* in Harper's *Lat. Dict.* are inexact for legal usage. *Pupillus* is an *impubes*, or, specifically, an *impubes* not in *patria potestas*, but in *tutela*. *Adultus* (*adulescens*) is used specifically in legal Latin to denote one between the ages of fourteen and twenty-five.

Inst. 1, 25

Excusantur autem tutores vel curatores variis ex causis: plerumque autem propter liberos, sive in potestate sint sive emancipati. Si enim tres liberos quis superstites Romae habeat vel in Italia quattuor vel in provinciis quinque, a tutela vel cura possunt excusari exemplo ceterorum munerum: nam et tutelam et curam placuit publicum munus esse. Sed adoptivi liberi non prosunt, in adoptionem autem dati naturali patri prosunt. Item nepotes ex filio prosunt, ut in locum patris succedant, ex filia non prosunt. Filii autem superstites tantum ad tutelae vel curae muneris excusationem prosunt, defuncti non prosunt. Sed si in bello amissi sunt, quaesitum est, an prosint. Et constat eos solos prodesse qui in acie amittuntur; hi enim, quia pro re publica ceciderunt, in perpetuum per gloriam vivere intelleguntur.

1. **Excusantur tutores vel curatores variis ex causis**: properly qualified persons called to the office of guardian became thereby *ipso iure* guardians and, except in the case of those appointed by testament, had no right of refusal. After the office came to be classed among the *munera civilia* (*publica*), a large number of reasons determined by law (*excusationes*) gave relief from the necessity of assuming the office and also released one from continuance in it, if already undertaken. These *excusationes* were developed chiefly during the empire, the most important of them being: (*a*) the *ius liberorum* (according to the *lex Iulia et Papia Poppaea*, excusing one having three children *Romae*, four *in Italia*, five *in provinciis*); (*b*) magistrates and those holding certain offices were excused (*e.g. qui res fisci administrat; qui curam viae habet*, etc., cf. also Fr. Vat. 134-147); (*c*) those in certain callings and professions were excused (*e.g. grammatici, medici*, etc., cf. also Fr. Vat. 149); (*d*) those already conducting three guardianships were excused (*tria tutelae onera*); (*e*) those already burdened by poverty, illness, advanced age, etc.; (*f*) those who proposed another (*nominare*) as better qualified for the office (*potioris nominatio*) were excused if their nominee were accepted by the magistrate.

10. **ex filia non prosunt**: the reason that the children of a daughter

Item divus Marcus rescripsit eum, qui res fisci administrat, a tutela vel cura quamdiu administrat excusari posse.

Item qui rei publicae causa absunt, a tutela et cura excusantur. Sed et si fuerunt tutores vel curatores, deinde rei publicae causa abesse coeperunt, a tutela et cura excusantur, quatenus rei publicae causa absunt, et interea curator loco eorum datur. Qui si reversi fuerint, recipiunt onus tutelae nec anni habent vacationem, ut Papinianus responsorum libro quinto scripsit; nam hoc spatium habent ad novas tutelas vocati. Et qui potestatem aliquam habent, excusare se possunt, ut divus Marcus rescripsit, sed coeptam tutelam deserere non possunt.

Item Romae grammatici, rhetores et medici et qui in patria sua id exercent et intra numerum sunt, a tutela vel cura habent vacationem.

Item tria onera tutelae non affectatae vel curae praestant vacationem, quamdiu administrantur.

Sed et propter paupertatem excusationem tribui tam divi fratres quam per se divus Marcus rescripsit, si quis imparem se oneri iniuncto possit docere. Item propter adversam valetudinem, propter quam nec suis quidem negotiis interesse potest, excusatio locum habet. Similiter eum qui litteras nesciret excusandum esse divus Pius

were not reckoned was because they belonged to the family of their own father or paternal grandfather, and not to that of their maternal grandfather (cf. note on *Mulier*, p. 107). Otherwise they would be counted twice.

13. **grammatici et medici**: by a rescript of Antoninus Pius (D. 27, 1, 6, 2) the number of those exempt from public duties in cities of different sizes was determined. The largest provincial cities were each allowed ten *medici*, five *grammatici*, and five *rhetores*. Philosophers, crowned athletes, and jurists who were members of the imperial council were also excused (*vacationem habent*).

19. **divi fratres**: *i.e.* M. Aurelius

rescripsit; quamvis et imperiti litterarum possunt ad administrationem negotiorum sufficere. Item maior septuaginta annis a tutela vel cura se potest excusare.

Fr. Vat. 157

Tunc demum excusandus est, qui prius datus fuerat, si is quem nominaverit et potior necessitudine et idoneus re fideque vel absens deprehendatur.

Ulp. 11, 14

Testamento nominatim tutores dati confirmantur eadem lege duodecim tabularum, his verbis: 'uti legassit super pecunia tutelave suae rei, ita ius esto'; qui tutores dativi appellantur.

Gai. 1, 144

Permissum est itaque parentibus, liberis quos in potestate sua habent testamento tutores dare: masculini quidem sexus impuberibus, feminini autem

and L. Verus, joint emperors 161–169 A.D. M. Aurelius reigned alone 169–177.

5. **si is quem nominaverit**: the privilege of exemption from the *munus tutelae* by *potioris nominatio*, on account of its abuse, was restricted by Septimius Severus and was altogether removed by Justinian.

7. **Testamento nominatim tutores dati**: there are three general modes by which *tutela* may arise: by testament (*tutela testamentaria*); by law (*tutela legitima*); by magisterial appointment (*tutela a magistratu data*, *tutela dativa*). *Tutores* are therefore called, respectively, — *testamentarii*, *legitimi*, *dativi*. By testament a paterfamilias can appoint a tutor for his *impuberes* children *in sua potestate* (including *postumi*) and for his grandchildren who will become *sui iuris* at his death. The *tutela testamentaria* takes precedence over every other kind, and the office of tutor is acquired *ipso iure* the moment the inheritance is entered upon.

9. **uti legassit super pecunia**: *legassit*, archaic perf. subj. (from *legare*, 'bequeath'). This phrase from the Twelve Tables is explained thus, — *latissima potestas tributa videtur et heredis instituendi et legata et libertates dandi, tutelas quoque constituendi.* — **pecunia**: used in the old sense of *property*; and *suae rei* means 'the rights belonging to family law, as regards property and power of the paterfamilias' (cf. Gradenwitz, *Hermes*, XXVIII, p. 329).

10. **tutores dativi appellantur**: though the sources call *tutores*

sexus cuius cumque aetatis sint, et tum quoque, cum nuptae sint.

Nepotibus autem neptibusque ita demum possumus testamento tutores dare, si post mortem nostram in patris sui potestatem recasuri non sint. Itaque si filius meus mortis meae tempore in potestate mea sit, nepotes ex eo non poterunt ex testamento meo habere tutorem, quamvis in potestate mea fuerint; scilicet quia mortuo me in patris sui potestate futuri sunt.

Cum tamen in compluribus aliis causis postumi pro iam natis habeantur, et in hac causa placuit non minus postumis quam iam natis testamento tutores dari posse, si modo in ea causa sint, ut si vivis nobis nascantur, in potestate nostra fiant.

Rectissime autem tutor sic dari potest 'L. Titium liberis meis tutorem do.' Sed et si ita scriptum sit 'liberis meis vel uxori meae Titius tutor esto,' recte datus intellegitur.

Ulp. 11, 3

Legitimi tutores sunt, qui ex lege aliqua descendunt; per eminentiam autem legitimi dicuntur, qui ex lege duodecim tabularum introducuntur,

testamento dati. '*dativi*.' the term is usually applied to *tutores* '*a magistratu dati*.'

1. **tum quoque, cum nuptae sint**: this means of course: *cum nuptiae sint sine manu*, which was the prevailing marriage in the time of Gaius. For the tutelage of women, see note on *Veteres*, p. 152.

10. **postumi pro iam natis habeantur**: cf. note on *Qui*, p. 78. *Postumi* are those born after the death of their father or other ascendant (*qui post mortem parentis nascuntur*), and also those born after the execution of a testament (*qui post testamentum factum nascuntur, vivo patre*, i.e. *testatore, nati*). A grandson was *postumus suus*, if born after the death of his father, otherwise, *postumus alienus*. In the latter case he could not receive a tutor by the testament of his grandfather.

15. **L. Titium liberis meis tutorem do**: appointment of a tutor in a will, according to the old *ius civile*, must be in the Latin language and

seu palam, quales sunt agnati, seu per consequentiam, quales sunt patroni.

Ulp. D. 26, 4, 1 Legitimae tutelae lege duodecim tabularum adgnatis delatae sunt et consanguineis, item patronis, id est his qui ad legitimam hereditatem admitti possint; hoc summa providentia, ut qui sperarent hanc successionem, idem tuerentur bona, ne dilapidarentur.

Gai. D. 26, 4, 9 Si plures sunt adgnati, proximus tutelam nanciscitur et, si eodem gradu plures sint, omnes tutelam nanciscuntur.

Inst. 1, 17 Ex eadem lege duodecim tabularum libertorum et libertarum tutela ad patronos liberosque eorum pertinet, quae et ipsa legitima tutela vocatur; non

in formal words, like other testamentary dispositions. In the post-classical period the phraseology was a matter of indifference.

3. **Legitimae tutelae lege duodecim tabularum adgnatis delatae**: in the absence of testamentary appointment, *tutores* are called to the office by operation of law, *i.e.* not by the will of the testator, but by the command of the lawgiver. According to the law of the Twelve Tables, following the rule of intestate succession, those first called to the guardianship were the nearest male agnates of the *pupillus* (*tutela agnatorum*). Cognates, as nearest intestate successors, were first admitted to the *tutela legitima* by Justinian (Nov. 118 and 127). After the analogy of the Twelve Tables, the guardianship of patrons and their children over their freedmen (*tutela patronorum*) was developed *per interpretationem*, in agreement with the rules governing intestate succession and the rights of patrons (cf. note on *patrono*, p. 103) on the principle that he who is to derive the benefit of the inheritance ought also to have the burden of the guardianship (*ubi successionis est emolumentum, ibi et tutelae onus esse debet*). The father had the same right over his emancipated child (*parens manumissor*); the *extraneus manumissor* over the one *e mancipio emancipatus;* and the sons of the *parens manumissor* over their previously emancipated brothers and sisters (*tutores fiduciarii*). The *tutela legitima* provided for the welfare of the guardian as well as for that of the pupils, inasmuch as it gave

quia nominatim ea lege de hac tutela cavetur, sed quia perinde accepta est per interpretationem, atque si verbis legis introducta esset. Eo enim ipso, quod hereditates libertorum libertarumque, si intestati decessissent, iusserat lex ad patronos liberosve eorum pertinere, crediderunt veteres voluisse legem etiam tutelas ad eos pertinere, cum et adgnatos, quos ad hereditatem vocat, eosdem et tutores esse iussit et quia plerumque, ubi successionis est emolumentum, ibi et tutelae onus esse debet.

Ulp. D. 26, 1, 6, 2

Tutoris datio neque imperii est neque iurisdictionis, sed ei soli competit, cui nominatim hoc dedit vel lex vel senatus consultum vel princeps.

Gai. 1, 185

Si cui nullus omnino tutor sit, ei datur in urbe Roma ex lege Atilia a praetore urbano et maiore parte tribunorum plebis, qui Atilianus tutor vocatur; in provinciis vero a praesidibus provinciarum ex lege Iulia et Titia.

Ulp. D. 26, 2, 11

Si quis sub condicione vel ex die tutorem dederit, medio tempore alius tutor dandus est,

the guardian the protection of the property to which he had the right of succession (*idem tuerentur bona ne dilapidarentur*).

10. **Tutoris datio**: sc. *a magistratu*. The appointment of guardian was not a function of the magistrate arising from his *imperium*. It was a power conferred by custom or by express statute. The magistrate exercised this power of appointment when *tutores testamentarii* and *legitimi* failed, or in case of their incapacity, release or removal. A tutor may be thus given for a temporary period, if the regular tutor has been appointed *sub condicione vel ex die*, or if he is absent in captivity, etc. The duty of making application (*postulatio tutoris*) for a *tutor dativus* fell upon the nearest heirs *ab intestato* of the *pupillus*.

14. **ex lege Atilia a praetore**: the date of the *lex Atilia* is uncertain. It is commonly placed at about 311 B.C. The emperor Claudius intrusted this duty to the consuls in Rome, later it was the duty of a special praetor (*praetor tutelaris*).

quamvis legitimum tutorem pupillus habeat; sciendum est enim, quamdiu testamentaria tutela speratur, legitimam cessare. Et si semel ad testamentarium devoluta fuerit tutela, deinde excusatus sit tutor testamentarius, adhuc dicimus in locum excusati dandum, non ad legitimum tutorem redire tutelam. Idem dicimus et si fuerit remotus; nam et hic idcirco abit, ut alius detur.

Gai. 1, 187

Ab hostibus quoque tutore capto ex his legibus tutor peti debet; qui desinit tutor esse, si is qui captus est in civitatem reversus fuerit; nam reversus recipit tutelam iure postliminii.

Gai. 1, 199

Ne tamen et pupillorum et eorum qui in curatione sunt negotia a tutoribus curatoribusque consumantur aut deminuantur, curat praetor, ut et tutores et curatores eo nomine satisdent. Sed hoc non est perpetuum; nam et tutores testamento dati satisdare non coguntur, quia fides eorum et diligentia ab ipso testatore probata est; et curatores, ad quos non e lege curatio pertinet, sed qui vel a consule vel a praetore vel a praeside provinciae dantur, plerumque non coguntur satisdare, scilicet quia satis honesti electi sunt.

Gai. 1, 196

Masculi autem cum puberes esse coeperint, tutela liberantur.

14. et tutores et curatores satisdent: for the security of the *pupillus*, the guardian, before entering upon his duty, took an inventory of his ward's property and (with the exception of the *tutor testamentarius*) gave security (*satisdatio*) for the proper conduct of his office (*rem pupilli salvam fore*).

17. quia fides eorum ab testatore probata: furthermore, testamentary guardians were not compelled to assume the *munus tutelae*, since they alone in the classical law had the right of rejection (*abdicatio*) without the requisite grounds for excuse (*excusatio ex iusta causa*), hence the fiduciary character of their office.

22. Masculi puberes tutela liberantur: guardianship terminates on the side of the *pupillus*: by death;

Inst. 1, 22, 1

Item finitur tutela, si adrogati sint adhuc impuberes vel deportati; item si in servitutem pupillus redigatur vel ab hostibus fuerit captus. Sed et si usque ad certam condicionem datus sit testamento, aeque evenit, ut desinat esse tutor existente condicione. Simili modo finitur tutela morte vel tutorum vel pupillorum. Sed et capitis deminutione tutoris, per quam libertas vel civitas eius amittitur, omnis tutela perit. Minima autem capitis deminutione tutoris, veluti si se in adoptionem dederit, legitima tantum tutela perit, ceterae non pereunt; sed pupilli et pupillae capitis deminutio licet minima sit, omnes tutelas tollit. Praeterea qui ad certum tempus testamento dantur tutores, finito eo deponunt tutelam. Desinunt autem esse tutores, qui vel removentur a tutela ob id quod suspecti visi sunt, vel ex iusta causa sese excusant.

Inst. 1, 26

Sciendum est suspecti crimen e lege duodecim tabularum descendere. Datum est autem ius

by every *capitis deminutio*; by the attainment of *pubertas*. On the side of the *tutor*: by completion of the appointed term; by *magna deminutio capitis* (also *minima*, in case of *tutela legitima*); by *excusatio* (also *abdicatio*, see above); by removal (*accusatio suspecti*).

2. **in servitutem pupillus redigatur**: it may be asked how far a child under the age of fourteen was capable of committing delicts, and whether he was amenable to criminal punishment. Only *infantia maiores* were capable of committing a wrong, but no definite age limit for criminal responsibility was established in the Roman law. Each case was determined by the question whether the person was near the age of puberty and understood that he was doing wrong (*si proximus pubertati sit et ob id intellegat se delinquere*, Gai. 3, 208). A *pupillus* might be reduced to slavery (if he were *proximus pubertati* and understood the nature of his act) for the reasons given above, cf. note on *iure*, p. 80.

17. **suspecti crimen**: according to the Twelve Tables, any one (including women related to the ward) may bring an action (*suspectum*

removendi suspectos tutores Romae praetori et in provinciis praesidibus earum et legato proconsulis. Consequens est, ut videamus, qui possint suspectos postulare. Et sciendum est quasi publicam esse hanc actionem, hoc est omnibus patere. Quin immo et mulieres admittuntur ex rescripto divorum Severi et Antonini, sed hae solae, quae pietatis necessitudine ductae ad hoc procedunt, ut puta mater; nutrix quoque et avia possunt, potest et soror. Suspectus autem remotus, si quidem ob dolum, famosus est; si ob culpam, non aeque. Suspectum enim eum putamus, qui moribus talis est, ut suspectus sit; enimvero tutor vel curator quamvis pauper est, fidelis tamen et diligens, removendus non est quasi suspectus.

postulare) against a tutor guilty of dishonesty or a breach of good faith in the conduct of his office (*qui non ex fide tutelam gerit*). A *tutor suspectus* is removed and, if guilty of *dolus*, he is branded with infamy (*infamia*, see *Class. Dict.*). Removal for other grounds, such as business inability, indolence, etc., is not attended with infamy.

4. **quasi publicam actionem**: an *actio publica* was one which made a demand chiefly in the interest of the state or community, and might be instituted by any citizen regardless of his private interest in the result. The *accusatio tutoris suspecti* is called *quasi publica*, because it is raised in the interest of the private rights of the individual ward and also because it is at the same time followed, if successful, by criminal punishment. Women were permitted to bring this action, though usually the privilege of instituting a public action was denied them.

9. **ob dolum . . . ob culpam**: *dolus* implies malicious intent (*sic definit Labeo: dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam*, D. 4, 3, 1, 2). *Culpa* implies negligence or fault, which may be gross (*lata*) or slight (*levis*): *magna negligentia culpa est, magna culpa dolus est*, D. 50, 16, 226. The tutor was removed with *infamia* for *culpa lata* (*lata culpa est nimia negligentia*, i.e. *non intellegere, quod omnes intelligunt*, D. 50, 16, 213, 2). Cf. also note on *dolo*, p. 252.

Gai. 1, 144

Veteres voluerunt feminas, etiamsi perfectae aetatis sint, propter animi levitatem in tutela esse. Itaque si quis filio filiaeque testamento tutorem dederit et ambo ad pubertatem pervenerint, filius quidem desinit habere tutorem, filia vero nihilo minus in tutela permanet; tantum enim ex lege Iulia et Papia Poppaea iure liberorum tutela liberantur feminae. Loquimur autem exceptis virginibus Vestalibus, quas etiam veteres in honorem sacerdotii liberas esse voluerunt, itaque etiam lege XII tabularum cautum est.

Gai. 1, 190

Feminas vero perfectae aetatis in tutela esse fere nulla pretiosa ratio suasisse videtur; nam quae vulgo creditur, quia levitate animi plerumque decipiuntur et aequum erat eas tutorum auctoritate regi, magis speciosa videtur quam vera; mulieres enim, quae perfectae aetatis sunt, ipsae sibi negotia tractant et in quibusdam

1. **Veteres voluerunt feminas in tutela esse**: from the earliest times all Roman women *sui iuris* were under a lifelong guardianship. This institution was based not so much on the helplessness of women as on the material interest which their agnates, as heirs at law, had in the protection and preservation of their property. The jurists, later on, sought to justify the perpetual tutelage of women on grounds of feminine frailty (*fragilitas sexus*), lack of business experience (*forensium rerum ignorantia*), unsound judgment (*infirmitas consilii*), and intellectual weakness (*animi levitas*); and that women for these reasons required a protector (*tutor*, *tutor*) like other incompetent persons (*e.g.* children, lunatics, and prodigals). The reason is more 'specious than true,' since in the classical law women beyond the age of puberty were capable of managing their own property. The lifelong guardianship of women was evidently not designed to guard their own interests alone. It gradually passed away, disappearing entirely about the beginning of the fourth century.

6. **ex lege Iulia et Papia Poppaea tutela liberantur**: *i.e. ingenuae trium liberorum iure*; *libertinae, quattuor liberorum iure*. Vestal virgins were exempt from tutelage, according to a very ancient law

causis dicis gratia tutor interponit auctoritatem suam, saepe etiam invitus auctor fieri a praetore cogitur.

Ulp. 11, 25 Pupillorum pupillarumque tutores et negotia gerunt et auctoritatem interponunt, mulierum autem tutores auctoritatem dumtaxat interponunt. Tutoris auctoritas necessaria est mulieribus quidem in his rebus: si lege aut legitimo iudicio agant, si se obligent, si civile negotium gerant, si libertae suae permittant in contubernio alieni servi morari, si rem mancipii alienent.

Gai. 1, 148 Vxori quae in manu est proinde ac filiae, item nurui quae in filii manu est proinde ac nepti tutor dari potest.

In persona tamen uxoris quae in manu est recepta est etiam tutoris optio, id est ut liceat ei permittere quem velit ipsa tutorem sibi optare, hoc modo TITIAE VXORI MEAE TVTORIS OPTIONEM DO. Quo casu licet uxori tutorem optare vel in omnes res vel in unam forte aut duas. Ceterum aut plena optio datur aut angusta. Plena ita dari solet, ut proxime supra diximus. Angusta ita dari solet TITIAE

ascribed to Numa (cf. Plut. *Numa*, 10, and Introd. 3), confirmed by the Twelve Tables (Gai. 1, 145).

4. **mulierum tutores auctoritatem interponunt**: guardianship of *feminae puberes* differs from that of all *impuberes* in that the woman administers her own property, her tutor having no *gestio* (*administratio rerum*) over her property, although his *auctoritas* was required in the transactions named and in several others.

10. **Vxori quae in manu est**: *tutela mulierum* arises in the same ways as *tutela impuberum*: by testament, by law, and by magisterial appointment. The *paterfamilias* could name in his testament a guardian for his *filiaefamilias* and *uxor in manu*. The latter, however, had a right of choice (*tutoris optio*) by which she could name a guardian agreeable to her will. The husband, instead of designating her guardian, gave his wife authority to make her own selection (*tutor optivus*). This right might be limited (*angusta*) or unlimited (*plena*).

VXORI MEAE TVTORIS OPTIONEM DVMTAXAT SEMEL DO, aut DVMTAXAT BIS DO. Quae optiones plurimum inter se differunt. Nam quae plenam optionem habet, potest semel et bis et ter et saepius tutorem optare; quae vero angustam habet optionem, si dumtaxat semel data est optio, amplius quam semel optare non potest; si dumtaxat bis, amplius quam bis optandi facultatem non habet. Vocantur autem hi, qui nominatim testamento tutores dantur, dativi, qui ex optione sumuntur, optivi.

Gai. 1, 157 Et olim quidem, quantum ad legem XII tabularum attinet, etiam feminae agnatos habebant tutores. Sed postea lex Claudia lata est, quae quod ad feminas attinet, agnatorum tutelas sustulit; itaque masculus quidem impubes fratrem puberem aut patruum habet tutorem, femina vero talem habere tutorem non potest.

Gai. 1, 173 Praeterea senatusconsulto mulieribus permissum est in absentis tutoris locum alium petere; quo petito prior desinit; nec interest, quam longe absit is tutor.

Ulp. 11, 20 Ex lege Iulia de maritandis ordinibus tutor datur a praetore urbis ei mulieri virginive, quam ex hac ipsa lege nubere oportet, ad dotem dandam di-

11. feminae agnatos habebant tutores: by the *tutela mulierum legitima* the same persons are called to the office as in the case of the *tutela impuberum*. The tutelage of agnates, which came to be avoided in several ways, was entirely removed by the emperor Claudius. *Tutela mulierum* thereafter was of little significance, except in the case of emancipated daughters in the guardianship of their fathers, and of freedwomen in that of their patrons.

16. senatusconsulto mulieribus permissum est: guardians are appointed for women, either permanently or temporarily, as when the regular tutor is prevented from granting his *auctoritas* by absence, youth (*e.g.* if the *tutor legitimus* is a *pupillus*), or physical and mental incapacity (*mutus*, *furiosus*, etc.).

20. Ex lege Iulia de maritandis

cendam promittendamve, si legitimum tutorem pupillum habeat. Sed postea senatus censuit, ut etiam in provinciis quoque similiter a praesidibus earum ex eadem causa tutores dentur.

Gai. 1, 180 Item si qua in tutela legitima furiosi aut muti sit, permittitur ei senatusconsulto dotis constituendae gratia tutorem petere.

Ulp. 12, 1 Curatores aut legitimi sunt, id est qui ex lege duodecim tabularum dantur, aut honorarii, id est qui a praetore constituuntur. Lex duodecim tabularum furiosum itemque prodigum, cui bonis interdictum est, in curatione iubet esse agnatorum.

tutor datur: according to this law, 4 A.D., freeborn mothers of three children and freedwomen bearing four children were exempt from the *tutela legitima* (agnates, patrons, etc.) as an encouragement to marriage and a reward for the rearing of children. Women could also free themselves from the limitations placed upon them by the *tutela legitima* (such as the veto of important acts) by a fictitious marriage with *manus* (*coemptio fiduciae causa*) followed by *remancipatio* (cf. note on *Coemptione*, p. 126). The *manumissor* became tutor, but as he was not *tutor legitimus*, the power of veto was lost. All of these subterfuges show the difficulty with which women escaped from legal disabilities in the earlier law and mark steps toward complete 'emancipation.'

8. Curatores aut legitimi aut honorarii: curators were appointed partly by operation of law, partly by the magistrate. The most important kinds of *cura* were: *cura furiosi*, *cura prodigi*, *cura minorum*, and *cura debilium*. According to the Twelve Tables, the *cura furiosi* and *prodigi* fell to the agnates as those most interested in the preservation of their ward's property (*cura legitima*). Failing agnates, appointment of curators was made by the magistrate. Later, the *cura legitima* passed away and the praetor gave the necessary curators (*cura dativa*, *curatores honorarii*). The *furiosus* had in lucid intervals (*dilucida intervalla*) full capacity of action, at other times he could not even acquire rights unaided. The Twelve Tables placed the *prodigus* (*cui bonis interdictum est*) in an analogous position, requiring oversight because he acted without reason. He could, however, acquire rights,

Ulp. D. 27, 10, 1

Lege duodecim tabularum prodigo interdicitur bonorum suorum administratio, quod moribus quidem ab initio introductum est. Sed solent hodie praetores vel praesides, si talem hominem invenerint, qui neque tempus neque finem expensarum habet, sed bona sua dilacerando et dissipando profudit, curatorem ei dare exemplo furiosi.

Inst. 1, 23, 3

Furiosi quoque et prodigi, licet maiores viginti quinque annis sint, tamen in curatione sunt adgnatorum ex lege duodecim tabularum. Sed solent Romae praefectus urbis vel practor et in provinciis praesides ex inquisitione eis dare curatores.

Sed et mente captis et surdis et mutis et qui morbo perpetuo laborant, quia rebus suis superesse non possunt, curatores dandi sunt.

but could not alienate property or bind himself without the authority of his curator. Curators appointed by testament were admitted only after the confirmation of a magistrate.

13. mente captis et surdis et mutis: the *cura debilium personarum* included the oversight of those persons incapable of managing their own affairs because of stupidity (*mente capti*) or bodily infirmities (*surdi*, *muti*, *morbo laborantes*, etc.). *Curatores* were appointed at the request of such persons and had the administration of their affairs. *Debiles* were capable of acquiring, alienating, binding themselves and making a testament. A *curator* might also be given to a *nasciturus* in anticipation of an inheritance (*cura ventris*); for the property of one in captivity or of a bankrupt (*cura bonorum*); for an inheritance not yet entered upon (*hereditas iacens*); for the conduct of a lawsuit, etc. For *cura minorum*, see note on *si non*, p. 120.

Law of Things: *res*, in its broadest sense, designates everything capable of private ownership *i.e.* property. Every object of a proprietary right which lacks personality (including slaves, *homines*) is called *res*. *Res* embraces everything which administers to the wants and requirements of man. In this sense, *res* are divided into corporeal (*corporales*) property, having a tangible existence, and incorporeal (*incorpo-*

The Law of Things (*Res*)

Gai. D. 1, 8, 1, 1

Quaedam res corporales sunt, quaedam incorporales. Corporales hae sunt, quae tangi possunt, veluti fundus, homo, vestis, aurum, argentum et denique aliae res innumerabiles. Incorporales sunt, quae tangi non possunt, qualia sunt ea, quae in iure consistunt, sicut hereditas, ususfructus, obligationes quoquo modo contractae. Nec ad rem pertinet, quod in hereditate res corporales continentur; nam et fructus, qui ex fundo percipiuntur, corporales sunt, et id quod ex aliqua obligatione nobis debetur plerumque corporale est, veluti fundus, homo, pecunia; nam ipsum ius successionis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est. Eodem numero

rales) property, having no tangible existence, but existing only in contemplation of law (*in iure consistunt*), *e.g.* rights in another's property, as a usufruct or right of way; rights growing out of contracts; rights of inheritance, etc. The right itself is a *res incorporalis*, though the object of that right, as a field, building, or slave, is a *res corporalis*. The Roman distinction is derived from popular usage rather than from scientific analysis, since, properly speaking, a right of ownership of a material object is just as intangible as a right to a right (*e.g.* a *right* to the '*right* of way' across another's field).

3. **fundus, homo**: for an explanation of *fundus* see text and note on this word, p. 161. *Homo*, meaning *servus*, is very common in legal Latin (cf. the formula in mancipation, 'hunc ego *hominem* ex iure Quiritium meum esse aio'). This meaning of the word is not given adequate recognition in Harper's *Lat. Dict.*

5. **qualia sunt ea, quae in iure consistunt**: 'such as, rights' (*quae in iure consistunt*, cf. above on *Law*). *Hereditas* means both the substance of an inheritance and also the right of inheritance, here in the latter meaning. *Vsusfructus* is the right to enjoy the use and fruits (*ius utendi et fruendi*) of another's property (see below, Servitudes). *Obligationes* (see below), *i.e.* the rights growing out of a bond of law (*vinculum iuris*) arising from contract or delict.

sunt et iura praediorum urbanorum et rusticorum, quae etiam servitutes vocantur.

Inst. 2, 1, pr. Modo videamus de rebus. Quae vel in nostro patrimonio vel extra nostrum patrimonium habentur. Quaedam enim naturali iure communia sunt omnium, quaedam publica, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur, sicut ex subiectis apparebit.

Gai. D. 1, 8, 1 Summa rerum divisio in duos articulos deducitur, nam aliae sunt divini iuris, aliae humani. Divini iuris sunt veluti res sacrae et religiosae. Sanctae

1. iura praediorum urbanorum et rusticorum: *praedia urbana*, *i.e.* real estate in buildings or rights pertaining to buildings. *Praedia rustica*, *i.e.* land and rights pertaining to land. Although originally the former were urban and the latter rural, the terms came to be applied irrespective of the situation of the property (see below, Servitudes, p. 188).

3. in nostro patrimonio: *patrimonium* meant originally paternal property, since only *patresfamilias* had rights of ownership, but here it means that which may form the property of a legal person and is capable of private ownership. *Res extra patrimonium* are, therefore, those things which are withdrawn from private ownership by law or by circumstances. Certain things are *by necessity* incapable of private ownership, *e.g. res divini iuris*, while certain other things, though the property of the state set apart for the common use of all citizens, are *withdrawn* from private ownership (*quae publicae sunt*, *nullius in bonis esse creduntur*, *ipsius enim universitatis esse creduntur*, D. 1, 8, 1). *Res in commercio* and *res extra commercium* are terms in common use, equivalent to *res in patrimonio* and *res extra patrimonium*. Of *res*, some are by nature common to all men (*res communes*); some are set apart for public use (*res publicae*, *res universitatis*); some things are the property of no one (*res nullius*); but most things are the property of individuals (*res singulorum*).

8. ex subiectis apparebit: see p. 165 of text.

9. Summa rerum divisio: the division of *res* into those belonging to divine law and those belonging to human law, is analogous to the division above of *res in patrimonio* and *res extra patrimonium*,

quoque res, veluti muri et portae, quodammodo divini iuris sunt. Quod autem divini iuris est, id nullius in bonis est; id vero, quod humani iuris est, plerumque alicuius in bonis est, potest autem et nullius in bonis esse: nam res hereditariae, antequam aliquis heres existat, nullius in bonis sunt. Hae autem res, quae humani iuris sunt, aut publicae sunt aut privatae. Quae publicae sunt, nullius in bonis esse creduntur, ipsius enim universitatis esse creduntur; privatae autem sunt, quae singulorum sunt.

Gai. 2, 4

Sacrae sunt, quae diis superis consecratae sunt; religiosae, quae diis Manibus relictae sunt. Sed sacrum quidem hoc solum existimatur, quod ex auctoritate populi Romani consecratum est, veluti lege de ea re lata aut senatusconsulto facto. Religiosum vero nostra

for *res divini iuris* are not capable of private ownership and therefore are not part of the private law (*i.e. res sacrae, sanctae, religiosae*). *Res divini iuris* are the property of nobody (*res nullius*) because they are the property of the gods and are hence withdrawn from individual, private ownership. *Res humani iuris* may be the property of nobody, not because they are incapable of private ownership, but because nobody has acquired ownership of them (*e.g.* wild game, gems along the seashore, etc., *nullius in bonis esse*).

10. **Sacrae sunt, quae diis superis consecratae**: *i.e. aedis, ara, signum, locus, pecunia*, cf. Festus s. v. *sacer mons*. A thing may become *res sacra* through the *dedicatio* of the people by a definite *lex* and the *consecratio* of the Pontifex Maximus. These proceedings should occur in due form. Cicero argued, on his return from exile, that his house had not been made a *res sacra* with due regard to divine law. In the appeal which he carried to the pontiffs, he maintained that the *dedicatio* was not valid. The pontiffs decided, favorably to Cicero's contention, that a *dedicatio* must occur at the hand of a magistrate designated by name, formally intrusted with this duty by the popular assembly. For an account of this decision see *ad Att.* 4, 2; also *de Dom.* 20, 45, 53.

14. **Religiosum**: a thing may be made *religiosa* by a private act, as by the burial of a dead body. The place of interment, along with

voluntate facimus mortuum inferentes in locum nostrum, si modo eius mortui funus ad nos pertineat. Sanctae quoque res, velut muri et portae, quodammodo divini iuris sunt.

Marcian. D. 1, 8, 8 Sanctum est, quod ab iniuria hominum defensum atque munitum est. Sanctum autem dictum est a sagminibus: sunt autem sagmina quaedam herbae, quas legati populi Romani ferre solent, ne quis eos violaret, sicut legati Graecorum ferunt ea quae vocantur cerycia. In municipiis quoque muros esse sanctos Sabinum recte respondisse Cassius refert, prohiberique oportere ne quid in his immitteretur.

Ulp. D. 11, 7, 2, 4 Purus autem locus dicitur, qui neque sacer neque sanctus est neque religiosus, sed ab omnibus huiusmodi nominibus vacare videtur.

Inst. 2, 1, 1 Et quidem naturali iure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. Nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et aedificiis

whatever may be erected upon it, becomes a *locus religiosus*, if it is intended that the interment be permanent and that the place shall become a sepulcher. In the law of Justinian, *res religiosae* were confined to places of entombment, but in the earlier law, sacred spots in Rome were regarded as *loca religiosa*, e.g. *Casa Romuli*, *Ficus Ruminalis*.

16. **iure communia sunt omnium haec**: most *res humani iuris* are *in commercio*. They may be in the control of private persons or they may be entirely independent of ownership, *e.g.* things existing still in a state of nature, as wild animals, gems along the seashore, etc. There may be also *res* which are incapable of absolute private ownership because they are the common property of mankind, *e.g.* air, running water, the high sea, the seashore, etc.

19. **villis et monumentis et aedificiis abstineat**: although the seashore is a *res communis omnium*, nevertheless whatever part of it is occupied by villas, etc., acquires the

abstineat, quia non sunt iuris gentium, sicut et mare. Flumina autem omnia et portus publica sunt, ideoque ius piscandi omnibus commune est in portubus fluminibusque. Est autem litus maris, quatenus hibernus fluctus maximus excurrit. Riparum quoque usus publicus est iuris gentium, sicut ipsius fluminis, itaque navem ad eas appellere, funes ex arboribus ibi natis religare, onus aliquid in his reponere cuilibet liberum est, sicuti per ipsum flumen navigare. Sed proprietas earum illorum est, quorum praediis haerent. Qua de causa arbores quoque in isdem natae eorundem sunt. Litorum quoque usus publicus iuris gentium est, sicut ipsius maris et ob id quibuslibet liberum est casam ibi imponere, in qua se recipiant, sicut retia siccare et ex mare deducere. Proprietas autem eorum potest intellegi nullius esse, sed eiusdem iuris esse, cuius et mare et quae subiacent mari, terra vel harena.

Ulp. D. 43, 8, 2, 2

Loca enim publica utique privatorum usibus deserviunt, iure scilicet civitatis, non quasi propria cuiusque.

Iav. D. 50, 16, 115

Fundus est omne, quidquid solo tenetur. Ager est, si species fundi ad usum hominis comparatur.

character of a *res in commercio* and loses its character as *litus maris* so long as the structure remains and does not interfere with the public use of the sea and seashore (*in litore iure gentium aedificare licere*, D. 43, 8, 4). Justinian classes the seashore among *res communes*, but Celsus regarded it as the property of the state possessing the territory along the coast (*litora, in quae populus Romanus imperium habet, populi Romani esse arbitror*, D. 43, 8, 3).

20. Fundus . . . Ager: still another division of things was that into *res mobiles* and *res immobiles*. The latter consist of the soil and what is attached to it (*solum et res soli*, i.e. *solo cohaerentes*). A definitely defined portion of the *solum* was called *fundus* or *ager*. The distinction between *solum Italicum* and *solum provinciale* was impor-

Ulp. D. 50, 16, 60

Locus est non fundus, sed portio aliqua fundi, fundus autem integrum aliquid est. Et plerumque sine villa locum accipimus, ceterum adeo opinio nostra et constitutio locum a fundo separat, ut et modicus locus possit fundus dici, si fundi animo eum habuimus. Non etiam magnitudo locum a fundo separat, sed nostra affectio et quaelibet portio fundi poterit fundus dici, si iam

tant up to the time of its removal by Justinian. The *ius civile* was applicable only to the former; the latter, as property of the state, was not capable of private ownership. The title to the *solum provinciale* was in the sovereign power (*in provinciali solo dominium populi Romani est vel Caesaris, nos autem possessionem tantum vel usumfructum habere videmur*, Gai. 2, 7). There is the further division of *solum provinciale* into *praedia stipendiaria* and *praedia tributaria*, according as land is situated in the territory belonging respectively to the Roman people or to the private *fiscus* of the emperor.

Res immobiles consist of *praedia rustica* and *praedia urbana*, according to their economic character as land or appurtenances to land. Land obtained by conquest was reserved partly for secular and partly for religious purposes. Beyond such reserved portions its uses were determined according to its character as arable or not arable land. If arable, it was surveyed (*agri limitati*) and devoted to the establishment of *coloniae* (*ager assignatus*) or to individuals (*ager viritanus*), or sold (*ager quaestorius*) or leased for a definite rent (*ager vectigalis*). Uncultivated land, on the other hand, was not surveyed, but it was assigned to individuals for their possession and use for the annual payment of a crop rent, one tenth of grain and one fifth of small fruits (*agri occupatorii, arcifinii*), or set apart for public forests and pastures (*silvae et pascua publica*) in return for a fixed rent (called '*scriptura*,' *quia publicanus scribendo conficit rationem cum pastore*, Festus).

Of *res mobiles*, some are capable of motion through their own power (*res se moventes, animalia*), *i.e.* slaves and beasts. Of beasts, there are two kinds, those enjoying their natural freedom (*ferae bestiae*) and those which have been tamed or are by nature tame (*mansuefactae, mansuetae*). The most important of the latter class are beasts of burden (*animalia quae collo dorsove domantur*). Cf. *res mancipi* below and Ulp. 19, 1, text, p. 163.

hoc constituerimus. Nec non et fundus locus constitui potest, nam si eum alii adiunxerimus fundo, locus fundi efficietur. Loci appellationem non solum ad rustica, verum ad urbana quoque praedia pertinere Labeo scribit. Sed fundus quidem suos habet fines, locus vero latere potest, quatenus determinetur et definiatur.

Florent. D. 50, 16, 211

Fundi appellatione omne aedificium et omnis ager continetur. Sed in usu urbana aedificia aedes, rustica villae dicuntur. Locus vero sine aedificio in urbe area, rure autem ager appellatur. Idemque ager cum aedificio fundus dicitur.

Ulp. D. 50, 16, 198

Vrbana praedia omnia aedificia accipimus, non solum ea quae sunt in oppidis, sed et si forte stabula sunt vel alia meritoria in villis et in vicis, vel si praetoria voluptati tantum deservientia, quia urbanum praedium non locus facit, sed materia. Proinde hortos quoque, si qui sunt in aedificiis constituti, dicendum est urbanorum appellatione contineri. Plane si plurimum horti in reditu sunt, vinearii forte vel etiam holitorii, magis haec non sunt urbana.

Gai. 2, 21

Sunt provincialia praedia, quorum alia stipendiaria, alia tributaria vocamus. Stipendiaria sunt ea, quae in his provinciis sunt, quae propriae populi Romani esse intelleguntur; tributaria sunt ea, quae in his provinciis sunt, quae propriae Caesaris esse creduntur.

Ulp. 19, 1

Omnes res aut mancipi sunt aut nec mancipi. Mancipi res sunt praedia in Italico solo, tam

19. **holitorii**: *vegetable gardens*, found in Harper's *Lat. Dict.* s. v. *olitorius*, formed from *holus*, 'vegetable.' *Horti*, 'ornamental gardens'; *horti vinearii*, 'vineyards'; *horti holitorii*, 'vegetable gardens.'

26. **res mancipi aut nec mancipi**: *mancipi* is the contracted gen. sing. (*mancipii*) stereotyped form

rustica, qualis est fundus, quam urbana, qualis domus; item iura praediorum rusticorum, velut via, iter, actus, aquaeductus; item servi et quadrupedes, quae dorso collove domantur, velut boves, muli, equi, asini. Ceterae res nec mancipi sunt. Elefanti et cameli quamvis collo dorsove domentur, nec mancipi sunt, quoniam bestiarum numero sunt.

Gai. 2, 18

Magna differentia est inter mancipi res et nec mancipi. Nam res nec mancipi ipsa traditione pleno iure alterius fiunt, si modo corporales sunt et ob id

which was still retained in legal Latin after the long forms in *-ii* prevailed (end of Augustan age). For the negative, see Harper's *Lat. Dict.* s. v. *neque*.

The terms *res mancipi* and *nec mancipi* were of much significance in the early law and down to the classical period, but they disappeared from the post-classical law. *Manus* meant in early law the power of the *paterfamilias* over the persons and things in his *familia* (cf. note on *de manu*, p. 88). *Mancipare* (*manu-capere*) meant the acquiring of *manus*, *i.e.* ownership (*dominium*). *Mancipium* (older form *mancupium*, showing the vowel progression from *man-capium*) had three distinct meanings: power of the housefather (synonymous with *manus*); the thing over which this power was exercised (especially slaves); the legal process by which certain things were acquired and alienated (real estate in Italy and certain appurtenances to real estate). The term *res mancipi* was derived from the last meaning. It designated those things acquired or alienated by the process called *mancipium* (later *mancipatio*). Transfer by *mancipium* alone gave full ownership (*dominium ex iure Quiritium*). Those things mentioned in the text as *res mancipi* originally constituted the property of the *familia*. All other things (*res nec mancipi*) were classed as *pecunia*, hence in the old formula of wills, '*familia pecuniaque mea*,' etc. There is no difference between *mancipium* and *mancipatio* as terms of procedure.

2. iura praediorum rusticorum: for the explanation of these rights appertaining to real property, called by the Romans Servitudes (cf. the English Easements), see below, text and notes, p. 188. Elephants and camels, not being native to Italy, were not regarded as among domesticated beasts of burden and were hence *res nec mancipi*.

8. traditione pleno iure alterius fiunt: in practice the importance of the distinction between *res*

recipiunt traditionem. Itaque si tibi vestem vel aurum vel argentum tradidero sive ex venditionis causa sive ex donationis sive quavis alia ex causa, statim tua fit ea res, si modo ego eius dominus sim. Mancipi vero res sunt, quae per mancipationem ad alium transferuntur; unde etiam mancipi res sunt dictae.

Acquisition of Ownership (*Iure Gentium*)

Gai. D. 41, 1, 1

Quarundam rerum dominium nanciscimur iure gentium, quod ratione naturali inter omnes homines peraeque servatur, quarundam iure civili, id est iure

mancipi and *res nec mancipi* lay in the fact that complete ownership according to the terms of the *ius civile* (*ex iure Quiritium*) could be acquired only by a formal transaction to which *cives Romani* alone were eligible, *i.e.* the solemn *mancipatio* or *in iure cessio* (see below, text p. 183); whereas *res nec mancipi* could pass by an informal act of delivery of possession (*traditio*) attended by an intention to confer ownership and having as a basis for the transaction an underlying fact (*causa*) as a reason for the operation.

Acquisition of Ownership: the Romans called ownership of corporeal things *dominium*. The owner of the thing forming part of a person's property was called *corporis dominus*, in distinction from one who has merely a right in the property of another, *i.e.* a *ius in re* (*aliena*). Rights of property may be absolute or limited. They are *absolute* when the owner possesses full legal disposition of the thing to the exclusion of every other person. This in Roman phraseology was a full and free property (*proprietas plena*). Proprietary right is *limited* when the right to use or enjoy the thing is separated from the ownership and belongs to another, or where any other real right in the thing restricted the rights of ownership. The owner was then said to possess the naked property (*nuda proprietas*), *i.e. dominium* stripped of part of its rights. The law prescribes certain modes by which property may be acquired. Acquisition (*acquisitio*) may be *per universitatem*, *e.g.* when property is acquired in an entire inheritance, with all the rights and duties involved; or it may be *rerum singularum*, as when property in single things is

proprio civitatis nostrae. Et quia antiquius ius gentium cum ipso genere humano proditum est, opus est, ut de hoc prius referendum sit.

Omnia igitur animalia, quae terra, mari, caelo capiuntur, id est ferae bestiae et volucres et pisces, capientium fiunt.

Quod enim nullius est, id ratione naturali occupanti conceditur. Nec interest quod ad feras bestias et volucres, utrum in suo fundo quisque capiat an in alieno. Plane qui in alienum fundum ingreditur venandi aucupandive gratia, potest a domino, si is providerit, iure prohiberi ne ingrederetur. Quidquid autem eorum ceperimus, eo usque nostrum esse intellegitur, donec nostra custodia coercetur; cum vero evaserit custodiam nostram et in naturalem libertatem se receperit, nostrum esse desinit et rursus occupantis fit.

Naturalem autem libertatem recipere intellegitur, cum vel oculos nostros effugerit vel ita sit in conspectu nostro, ut difficilis sit eius persecutio. Illud quaesitum est, an

acquired. *Acquisitio rerum singularum* may be *civilis* or *naturalis*, *i.e.* in accordance with the requirements of the *ius civile* or with those of the *ius gentium* (*naturalis ratio*). The acquisition of *res singulae* is first considered (cf. note on *per universitatem*, p. 259).

4. **Omnia animalia, quae terra, mari**: the first mode of acquisition *iure gentium* is *occupatio* (Occupancy of English law). It is the acquisition of title to a *res nullius* by first seizure and possession, with the intention (*animus*) to make it one's property (*quod enim nullius est id ratione naturali occupanti conceditur*). '*res nullius cedit occupanti*' (as stated in modern times). In this connection the Romans meant by *res nullius*: a thing which has never had an owner (as wild game, undiscovered islands, gems picked up on the seashore); or a thing which has been abandoned by its former owner, voluntarily, with the intention of relinquishing his proprietary right in it (as derelicts, or largesses thrown to a crowd).

8. **utrum in suo fundo quisque capiat an**: hunting, fishing, and fowling were entirely free in Roman times, so that game captured on

fera bestia, quae ita vulnerata sit, ut capi possit, statim nostra esse intellegatur. Trebatio placuit statim nostram esse et eo usque nostram videri, donec eam persequamur, quod si desierimus eam persequi, desinere nostram esse et rursus fieri occupantis; itaque si per hoc tempus, quo eam persequimur, alius eam ceperit eo animo, ut ipse lucrifaceret, furtum videri nobis eum commisisse. Plerique non aliter putaverunt eam nostram esse, quam si eam ceperimus, quia multa accidere possunt, ut eam non capiamus, quod verius est. Apium quoque natura fera est; itaque quae in arbore nostra consederint, antequam a nobis alveo concludantur, non magis nostrae esse intelleguntur quam volucres, quae in nostra arbore nidum fecerint. Ideo si alius eas incluserit, earum dominus erit. Favos quoque si quos hae fecerint, sine furto quilibet possidere potest; sed ut supra quoque diximus, qui in alienum fundum ingreditur, potest a domino, si is proviserit, iure prohiberi ne ingrederetur. Examen, quod ex alveo nostro evolaverit, eo usque nostrum esse intellegitur, donec in conspectu nostro est nec difficilis eius persecutio est; alioquin occupantis fit. Pavonum et columbarum fera natura est nec ad rem

the property of another became the undisputed property of the huntsman. The term *game*, being more comprehensive than in modern times, embraced also bees, peacocks, and doves. Of wild animals (*ferae naturae*) there is a distinction between those partly tamed, as deer, peacocks, bees, etc., and game in a state of nature. Property in the former ceases when the *animus revertendi* ceases; in case of the latter, detention alone is required. As a swarm of bees has no intention of returning, it continues to be the property of the owner of the hive as long only as he keeps the swarm in sight and has the possibility of recapturing it. In the case of tame animals, straying does not extinguish the rights of owners, even though *animus revertendi* is absent.

pertinet, quod ex consuetudine avolare et revolare solent; nam et apes idem faciunt, quarum constat feram esse naturam; cervos quoque ita quidam mansuetos habent, ut in silvas eant et redeant, quorum et ipsorum feram esse naturam nemo negat. In his autem animalibus, quae consuetudine abire et redire solent, talis regula comprobata est, ut eo usque nostra esse intellegantur, donec revertendi animum habeant, quod si desierint revertendi animum habere, desinant nostra esse et fiant occupantium. Intelleguntur autem desisse revertendi animum habere tunc, cum revertendi consuetudinem deseruerint. Gallinarum et anserum non est fera natura; palam est enim alias esse feras gallinas et alios feros anseres. Itaque si quolibet modo anseres mei et gallinae meae turbati turbataeve adeo longius evolaverint, ut ignoremus ubi sint, tamen nihilo minus in nostro dominio tenentur. Qua de causa furti nobis tenebitur, qui quid eorum lucrandi animo adprehenderit. Item quae ex hostibus capiuntur, iure gentium statim capientium fiunt; adeo quidem, ut et liberi homines in servitutem deducantur; qui tamen, si evaserint hostium potes-

18. quae ex hostibus capiuntur: the principle of Occupancy (*occupatio*) was extended in ancient times to the property and persons of enemies captured in war. Whatever property of the enemy (*res hostiles*) was taken within Roman possessions became the property of those seizing it. Booty of war, however, as a rule fell to the victorious state, the army being the mere representative of the state. Occasionally movable property was allowed to become the property of the soldiers capturing it. The principle of *postliminium* operated in cases of prizes of war, when they fell into the hands of their original owners (*postliminium est ius amissae rei recipiendae ab extraneo et in statum pristinum restituendae*, D. 49, 15, 19). See also text and note on *postliminium*, p. 85. According to Cicero (*Top.* 8, 36), those things which reverted to their original owner by *postliminium* were: ships of war, slaves, horses, mules. Cf. also D. 49, 15, 2.

tatem, recipiunt pristinam libertatem. Praeterea quod per alluvionem agro nostro flumen adicit, iure gentium nobis adquiritur. Per alluvionem autem id videtur adici quod ita paulatim adicitur, ut intellegere non possimus, quantum quoquo momento temporis adiciatur. Quod si vis fluminis partem aliquam ex tuo praedio detraxerit et meo praedio attulerit, palam est eam tuam permanere. Plane si longiore tempore fundo meo haeserit arboresque, quas secum traxerit, in meum fundum radices egerint, ex eo tempore videtur meo fundo adquisita esse. Insula quae in mari nascitur (quod raro accidit) occupantis fit, nullius enim

1. quod per alluvionem: passing from *occupatio* as a mode of acquisition, the text next mentions various ways in which property may be acquired without any act of possession on the part of the one acquiring, but rather by some increase in the thing already owned, due to the action of the forces of nature. This increase is called *accessio*. The word is also extended by commentators to indicate the mode by which title to the actual increase is acquired. Owners of land acquire by Accession all increase by alluvial soil; or by *avulsio* ('sudden increase'), if sufficient time has elapsed (*si longiore tempore fundo meo haeserit arboresque radices egerint*); by formation of an *insula in flumine*; by change of river bed (*alveus relictus*); by building on another's soil (*inaedificatio*); by planting and sowing (*plantatio, satio*). '*Superficies solo cedit.*'

5. vis fluminis partem aliquam detraxerit: such sudden removal of a considerable portion of soil the commentators call *avulsio*. The former owner retained ownership in this mass because the increase in the soil of another was perceptible and might be recoverable by detachment (hence not *alluvio*). The exception to this was noticed above.

10. Insula quae in mari nascitur: since the sea, seashore, and bed of the sea were *res communes* and could not become the property of any individual person, an island formed in the sea was looked upon as part of the bed of the sea risen to the surface, and it was, therefore, treated as a *res nullius*, subject to *occupatio* by discovery and first seizure. An island formed in a river (*in flumine nata*) was treated differently for the reason that riparian owners had a qualified ownership in the bed of the river, though its

esse creditur. In flumine nata (quod frequenter accidit), si quidem mediam partem fluminis tenet, communis est eorum, qui ab utraque parte fluminis prope ripam praedia possident, pro modo latitudinis cuiusque praedii, quae latitudo prope ripam sit. Quod si alteri parti proximior sit, eorum est tantum, qui ab ea parte prope ripam praedia possident. Quod si uno latere perruperit flumen et alia parte novo rivo fluere coeperit, deinde infra novus iste rivus in veterem se converterit, ager, qui a duobus rivis comprehensus in formam insulae redactus est, eius est scilicet, cuius et fuit. Quod si toto naturali alveo relicto

waters were subject to the uses of the public. Whatever part ceased to serve the public as a stream became subject to the rights of the riparian owners.

4. **pro modo latitudinis cuiusque praedii**: if the boundary lines of land lying on either side of the stream intersected the banks at varying angles, each riparian owner would acquire as much of the island as was included between his boundary lines (*pro modo latitudinis*) projected perpendicularly to the stream until they intersected the line dividing the island longitudinally, *i.e.* if the island stood in the middle of the stream, otherwise to the line marking the center of the stream.

5. **proximior**: this form occurs occasionally in late Latin and shows the linguistic tendency to double comparison. It contains the superlative suffix, *-mo-*, and the comparative suffix, *-ios-* (*ior*). *Proximus* first appears in legal Latin in the Twelve Tables, *adgnatus proximus* (Tab. 5) meaning the agnate standing nearest in collateral relationship to any given person (cf. below, note on *ad consanguineos*, p. 285). *Proximus* alone then became frequent in the sense of the nearest collateral kindred (in the agnatic family). It was thus regarded as a positive. *Proximior* came therefore to mean the 'nearer proximus.' *Proximus* was also used in the sense of 'neighbor,' and *proximior* may have meant the 'nearer' neighbor. Kalb, *Juristlatein*, p. 56 (cf. double comparison in English, nearer, nearest).

9. **ager, qui a duobus rivis comprehensus**: when a piece of land is converted into an island by a new branch of a stream merely, the ownership of the property is not affected, just as inundated land suffers no change of ownership (*inundatio*).

flumen alias fluere coeperit, prior quidem alveus eorum est, qui prope ripam praedia possident, pro modo scilicet latitudinis cuiusque praedii, quae latitudo prope ripam sit; novus autem alveus eius iuris esse incipit, cuius et ipsum flumen, id est publicus iuris gentium. Quod si post aliquod temporis ad priorem alveum reversum fuerit et flumen, rursus novus alveus eorum esse incipit, qui prope ripam eius praedia possident. Cuius tamen totum agrum novus alveus occupaverit, licet ad priorem alveum reversum fuerit flumen, non tamen is, cuius is ager fuerat, stricta ratione quicquam in eo alveo habere potest, quia et ille ager qui fuerat desiit esse amissa propria forma et, quia vicinum praedium nullum habet, non potest ratione vicinitatis ullam partem in eo alveo habere, sed vix est, ut id obtineat. Aliud sane est, si cuius ager totus inundatus fuerit; namque inundatio speciem fundi non mutat et ob id, cum recesserit aqua, palam est eiusdem esse, cuius et fuit. Cum quis ex aliena materia speciem aliquam suo nomine fecerit, Nerva

17. **Cum quis ex aliena materia speciem fecerit**: in the cases of acquisition just considered, ownership was acquired because something became connected with one's property in such a way that the accessory thing acceded to the principal thing (*'res accessoria cedit rei principali'*). The text now considers cases in which things are transformed into a new product or a new species is manufactured (*species facta*). He who performs the work which transforms the property of another into a new product becomes in general the owner of it. This mode of acquisition is now called Specification (from the Roman *speciem facere*). The rules governing ownership in cases of Specification were: a thing made partly of one's own and partly of another's materials is the property of the workman (producer of the new thing); when the new *species* has been made wholly of another's materials there is this distinction (according to the *media sententia* of the text): (*a*) if the new product can be restored to its former condition, the owner of the materials becomes the owner of the product; (*b*) if it cannot be so restored, the product becomes

et Proculus putant hunc dominum esse qui fecerit, quia quod factum est, antea nullius fuerat. Sabinus et Cassius magis naturalem rationem efficere putant, ut qui materiae dominus fuerit, idem eius quoque, quod ex eadem materia factum sit, dominus esset, quia sine materia nulla species effici possit: veluti si ex auro vel argento vel aere vas aliquod fecero, vel ex tabulis tuis navem aut armarium aut subsellia fecero, vel ex lana tua vestimentum, vel ex vino et melle tuo mulsum, vel ex medicamentis tuis emplastrum aut collyrium, vel ex uvis aut olivis aut spicis tuis vinum vel oleum vel frumentum. Est tamen etiam media sententia recte existimantium, si species ad materiam reverti possit, verius esse, quod et Sabinus et Cassius senserunt, si non possit reverti, verius esse, quod Nervae et Proculo placuit, ut ecce vas conflatum ad rudem massam auri vel argenti vel aeris reverti potest, vinum vero vel oleum vel frumentum ad uvas et olivas et spicas reverti non potest; ac ne mulsum quidem ad mel et vinum vel emplastrum aut collyria ad medicamenta reverti possunt. Videntur tamen mihi recte quidam dixisse non debere dubitari, quin alienis spicis excussum frumentum eius sit, cuius et spicae fuerunt; cum enim grana, quae spicis continentur, perfectam habeant suam speciem, qui excussit spicas, non novam speciem

the property of the maker. In each case proper compensation must be made for the workmanship or the value of the materials respectively. The workman acting *bona fide* must be paid for his labor; acting *mala fide*, he must make full compensation for damages to the owner of the materials. The dispute which prevailed between the Proculian and Sabinian schools regarding Specification was determined by Justinian as stated above, following the '*media sententia*' referred to by Gaius in the text.

23. **non novam speciem facit**: in other words, the change wrought must be one of genuine manufacture of a new product. Hence the

facit, sed eam quae est detegit. Voluntas duorum dominorum miscentium materias commune totum corpus efficit, sive eiusdem generis sint materiae, veluti vina miscuerunt vel argentum conflaverunt, sive diversae, veluti si alius vinum contulerit, alius mel, vel alius aurum, alius argentum; quamvis et mulsi et electri novi corporis sit species. Sed et si sine voluntate dominorum casu confusae sint duorum materiae vel eiusdem generis vel diversae, idem iuris est. Cum in suo loco aliquis aliena materia aedificaverit, ipse dominus intellegitur aedificii, quia omne quod inaedificatur solo cedit. Nec tamen ideo is qui materiae dominus fuit desiit eius dominus esse, sed tantisper neque vindicare eam potest neque ad exhibendum de ea agere propter legem

mere threshing of another's grain or dyeing of wool was insufficient to give right of property to the one performing the labor.

2. **miscentium materias commune totum corpus**: things so joined together that they may be separated, as the mingling of flocks or the union of silver, belonging to different persons (*commixtio*), produce no change of ownership so long as the resulting union may be taken apart, or may be chemically separated. Sometimes, however, the result of mingling things belonging to different owners produces an inseparable union, as the mingling of wine and wine (*confusio*). Here a co-ownership (*condominium, communio*) is produced, each original owner losing ownership of his part and becoming joint owner of the whole.

12. **neque vindicare eam potest**: the owner of the materials used in erecting a building or in cultivating a vineyard on the land of another continued to be their owner, conforming to the rule governing other separable unions, but for public policy (*ne quis tignum alienum aedibus suis iunctum eximere cogatur*) the Twelve Tables denied him the right to bring a real action for his materials (*rei vindicatio*), or an action for their production in court (*ad exhibendum*), where the conversion had been made *bona fide* (*quod providenter lex efficit, ne vel aedificia sub hoc praetextu diruantur vel vinearum cultura turbetur*, D. 47, 3, 1). The owner could not recover his property, but he could bring an action for double the value of the materials used (*actio de tigno iuncto aedibus vine-*

duodecim tabularum, qua cavetur, ne quis tignum alienum aedibus suis iunctum eximere cogatur, sed duplum pro eo praestet. Appellatione autem tigni omnes materiae significantur, ex quibus aedificia fiunt. Ergo si aliqua ex causa dirutum sit aedificium, poterit materiae dominus nunc eam vindicare et ad exhibendum agere. Illud recte quaeritur, an, si id aedificium vendiderit is qui aedificaverit et ab emptore longo tempore captum postea dirutum sit, adhuc dominus materiae vindicationem eius habeat. Causa dubitationis est, an eo ipso, quo universitas aedificii longo tempore capta est, singulae quoque res, ex quibus constabat, captae essent, quod non placuit. Ex diverso si quis in alieno solo sua materia aedificaverit, illius fit aedificium, cuius et solum est et, si scit alienum solum esse, sua voluntate amississe proprietatem materiae intellegitur; itaque neque diruto quidem aedificio vindicatio eius materiae competit. Certe si dominus soli petat aedificium nec solvat pretium materiae et mercedes fabrorum, poterit per exceptionem doli mali repelli, utique si nescit qui aedificavit alienum esse solum et tamquam in suo bona fide aedificavit; nam si scit, culpa ei obici potest, quod temere aedificavit in eo

eave). If the building should be demolished, the owner of the materials had an action, either *rei vindicatio* or *rem ad exhibendum*, for their recovery, granting that he had not already availed himself of the *actio de tigno iuncto*.

8. **longo tempore captum**: *i.e. rem* or *dominium usu captum*. From these phrases, especially *usucapere*, *capere* alone came to have the meaning, 'acquire by prescription,' often as here. For the prescriptive periods, see *Vsucapio*, p. 184 below and notes.

10. **eo ipso, quo universitas**: for *quo* read *quod* (Mommsen), the clause being explanatory of *eo ipso*. It was held that acquisition *per universitatem* by prescriptive title did not carry with it the ownership of individual things of which the entirety was composed. *Universitas* (modern *universitas rerum*) means several individual things (*res singulae*) which, when taken

solo, quod intellegeret alienum. Si alienam plantam in meo solo posuero, mea erit: ex diverso si meam plantam in alieno solo posuero, illius erit, si modo utroque casu radices egerit. Antequam enim radices ageret, illius permanet, cuius et fuit. His conveniens est, quod, si vicini arborem ita terra presserim, ut in meum fundum radices egerit, meam effici arborem; rationem enim non permittere ut alterius arbor intellegatur, quam cuius fundo radices egisset. Et ideo prope confinium arbor posita, si etiam in vicinum fundum radices egerit, communis est. Qua ratione autem plantae quae terra coalescunt solo cedunt, eadem ratione frumenta quoque quae sata sunt solo cedere intelleguntur. Ceterum sicut is, qui in alieno solo aedificavit, si ab eo dominus soli petat aedificium, defendi potest per exceptionem doli mali, ita eiusdem exceptionis auxilio tutus esse poterit, qui in alienum fundum sua impensa consevit. Litterae quoque licet aureae sint, perinde chartis membranisque cedunt, ac solo cedere solent ea quae aedificantur aut seruntur. Ideoque si in chartis membranisve tuis carmen vel historiam vel orationem scripsero, huius

together, in the eye of the law form a whole (*e.g. universitas aedium*).

5. **His conveniens est, quod meam effici arborem**: there seems to be authority in legal Latin for this construction of *quod* with the infin. and subject accus., a construction cited by Schmalz, Müller's *Handbuch*, II², p. 499, from Cyprian (died 258 A.D.). It is also employed by Ulpian (died 228 A.D.), D. 45, 1, 30, *sciendum est, quod si quis se scripserit fideiussisse, videri omnia sollemniter acta* (cf. also Kalb, *Roms Juristen*, p. 31).

14. **defendi potest per exceptionem doli mali**: an *exceptio doli mali* was a plea or defense set up by the defendant alleging fraud on the part of the plaintiff, and intended as an offset to the latter's claim. An *actio in rem* (for the ownership of the building) was therefore met by a claim for compensation in the nature of an *exceptio* to the demand of the plaintiff.

20. **huius corporis non ego sed tu**

corporis non ego, sed tu dominus esse intellegeris. Sed si a me petas tuos libros tuasve membranas nec impensas scripturae solvere velis, potero me defendere per exceptionem doli mali, utique si bona fide eorum possessionem nanctus sim. Sed non uti litterae chartis membranisve cedunt, ita solent picturae tabulis cedere, sed ex diverso placuit tabulas picturae cedere. Vtique tamen conveniens est domino tabularum adversus eum qui pinxerit, si is tabulas possidebat, utilem actionem dari, qua ita efficaciter experiri poterit, si picturae impensam exsolvat; alioquin

dominus: according to the text, writing accedes to the paper on the principle that the writing cannot exist without the paper (*necessarie ei rei cedit, quod sine illa esse non potest*, see below), and that the result is still fundamentally paper. In case of painting, however, the substance forming the basis of the paint accedes to the painting (*specificatio*). On this point the sources differ. The proper distinction is well stated by Sohm. When the result of the painting is simply a painted surface, as a canvas, the canvas still existing as the principal thing, the result is a case of Accession (*e.g.* a drop curtain or mere daub); the owner of the canvas remains owner of the painted thing (cf. text below, p. 177, Paul. D. 6, 1, 23, 2). When the result of the painting is a work of art, a new thing has been created which is neither mere paint nor canvas, — the materials losing their identity in a new creation, — the case is then one of Specification. The new product is the property of the artist. The same difference exists in the case of writing — mere paper containing writing is a case of Accession; if the writing is a literary performance, it is Specification. Ownership in each case follows the regular rule, according to the economic changes in the condition of the thing under consideration. Cf. Sohm, *Institutionen*, 8th ed., p. 319, or Eng. trans. (1892) p. 248.

9. utilem actionem dari: the owner of the tablet on which the painting was executed was treated as if he were the owner of the finished work, because he was allowed to assert that he was the owner when the painting was in the painter's possession, and the Praetor granted him an equitable action (*actio utilis*) by which he could sue fictitiously as if he were owner. The painter had an *actio*

nocebit ei doli mali exceptio, utique si bona fide possessor fuerit qui solverit. Adversus dominum vero tabularum ei qui pinxerit rectam vindicationem competere dicimus, ut tamen pretium tabularum inferat, alioquin nocebit ei doli mali exceptio.

Paul. D. 6, 1, 23, 2

Si quis rei suae alienam rem ita adiecerit, ut pars eius fieret, veluti si quis statuae suae brachium aut pedem alienum adiecerit, aut scypho ansam vel fundum, vel candelabro sigillum, aut mensae pedem, dominum eius totius rei effici vereque statuam suam dicturum et scyphum plerique recte dicunt. Sed et id, quod in charta mea scribitur aut in tabula pingitur, statim meum fit, licet de pictura quidam contra senserint propter pretium picturae; sed necesse est ei rei cedi, quod sine illa esse non potest. In omnibus igitur istis, in quibus mea res per praevalentiam alienam rem trahit meamque efficit, si eam rem vindicem, per exceptionem doli mali cogar pretium eius quod accesserit dare. Item quaecumque aliis iuncta sive adiecta accessionis loco cedunt, ea quamdiu cohaerent dominus vindicare non potest, sed ad exhibendum agere

directa, since he had become by his work legally owner. Except for the *actio utilis*, the owner of the tablet could merely bring a personal action against the painter for the value of the materials used. The painter had a real right to the property (*vindicatio recta*), having acquired title to it by *specificatio*.

10. **dicturum (esse)**: the subject is *eum*, referring to *quis*. The subject of the infin., even when different from that of the principal verb, is omitted in legal Latin as in the comic writers (cf. Plautus. *Capt.* 256; *Trin.* 956; *Men.* 539). *Eum* and *eos* are frequently omitted, *se* less often.

14. **sed necesse est ei rei cedi**: Mommsen proposes the reading: *necessarie ei rei cedit, quod*, etc.

19. **accessionis loco cedunt**: *accessio* means here that the union is a separable one. The *actio ad exhibendum* is for the separation, the *rei vindicatio*, for the transfer, of the property.

potest, ut separentur et tunc vindicentur ; scilicet excepto eo, quod Cassius de ferruminatione scribit. Dicit enim, si statuae suae ferruminatione iunctum bracchium sit, unitate maioris partis consumi et quod semel alienum factum sit, etiamsi inde abruptum sit, redire ad priorem dominum non posse. Non idem in eo quod adplumbatum sit, quia ferruminatio per eandem materiam facit confusionem, plumbatura non idem efficit. Ideoque in omnibus his casibus, in quibus neque ad exhibendum neque in rem locum habet, in factum actio necessaria est. At in his corporibus, quae ex distantibus corporibus essent, constat singulas partes retinere suam propriam speciem, ut singuli homines, singulae oves ; ideoque posse me gregem vindicare, quam-

6. quia ferruminatio per eandem materiam facit: the distinction between *plumbatura* and *ferruminatio* is: the former is the mere soldering together of two metals with a third, in such a way that they do not lose their identity and may be afterward separated. No new product results from this union. Neither of the two metals consumes the other. Hence there is no change of property, and after an *actio ad exhibendum*, either of the component parts may be the object of a *rei vindicatio*. *Ferruminatio*, on the contrary, is the union of one thing with another in such a way that the accessory becomes consumed by the principal thing — the accessory loses its identity, and the result of the union is a finished product, as an arm affixed to a statue; the result is a statue — the arm was not a statue. Hence the thing so consumed may not be claimed by *vindicatio*, nor is it subject to an *exhibendum*, since ownership in it has changed.

10. At in his corporibus, quae ex distantibus: D. 41, 3, 30, *tria autem genera sunt corporum, unum, quod continetur uno spiritu et Graece* ἡνωμένον (*i.e. continuum*) *vocatur, ut homo, tignum, lapis et similia ; alterum, quod ex contingentibus, hoc est pluribus inter se cohaerentibus constat, quod* συνημμένον (*i.e. coniunctum*) *vocatur, ut aedificium, navis, armarium ; tertium, quod ex distantibus constat, ut corpora plura non soluta, sed uni nomini subiecta, veluti populus, legio, grex.* The distinction is between *corpora distantia*, those things which unite to form an entirety (*universitas*), of which

vis aries tuus sit immixtus, sed et te arietem vindicare posse. Quod non idem in cohaerentibus corporibus eveniret: nam si statuae meae bracchium alienae statuae addideris, non posse dici bracchium tuum esse, quia tota statua uno spiritu continetur. Tignum alienum aedibus iunctum nec vindicari potest propter legem duodecim tabularum, nec eo nomine ad exhibendum agi nisi adversus eum, qui sciens alienum iunxit aedibus; sed est actio antiqua de tigno iuncto, quae in duplum ex lege duodecim tabularum descendit. Item si quis ex alienis cementis in solo suo aedificaverit, domum quidem vindicare poterit, cementa autem resoluta prior dominus vindicabit, etiamsi post tempus usucapionis dissolutum sit aedificium, postquam a bonae fidei emptore possessum sit; nec enim singula cementa usucapiuntur, si domus per temporis spatium nostra fiat.

Treasure-trove

Paul. D. 41, 1, 31, 1

Thensaurus est vetus quaedam depositio pecuniae, cuius non exstat memoria, ut iam dominum

the individual things (*res singulae*) remain intact, and *corpora cohaerentia*, where the component parts are lost in the resulting *corpus*.

10. **ex alienis cementis**: the spelling *cementum* for *caementum* (*caedmentum*, 'quarried stone') of the Florentine Ms. is not given in Harper's *Lat. Dict.* See *caementum*.

13. **post tempus usucapionis**: according to the classical law, the prescriptive period necessary for acquisition of immovable property was ten years where both parties interested lived in the same province (*inter praesentes*), and twenty years where they lived in different provinces (*inter absentes*). Although a house had been acquired by this title, the owner of the materials (*cementa*) was not prevented from suing for them if the house were demolished, even after the prescriptive period had elapsed (*post tempus usucapionis*).

17. **Thensaurus**: *thensaurus*, the Latinized form of the Greek,

non habeat; sic enim fit eius qui invenerit, quod non alterius sit. Alioquin si quis aliquid vel lucri causa vel metus vel custodiae condiderit sub terra, non est thensaurus; cuius etiam furtum fit.

Inst. 2, 1, 39

Thesauros, quos quis in suo loco invenerit, divus Hadrianus naturalem aequitatem secutus ei concessit qui invenerit. Idemque statuit, si quis in sacro aut in religioso loco fortuito casu invenerit. At si quis in alieno loco non data ad hoc opera, sed fortuitu invenerit, dimidium domino soli concessit. Et convenienter, si quis in Caesaris loco invenerit, dimidium inventoris, dimidium Caesaris esse statuit. Cui conveniens est, ut, si quis in publico loco vel fiscali invenerit, dimidium ipsius esse, dimidium fisci vel civitatis.

θησαυρός (cf. Plautus, *Trin.* Prol. 18), occurs in the *Corpus Iuris* both in the nasalized form, and in the later, *thesaurus*. There is a difference of opinion as to the title by which property in a treasure-trove (*thesaurus*) is acquired (*occupatio* or *accessio*). The requirements stated in the definition necessary to constitute a thing a *thesaurus* should be carefully heeded. It must be a *vetus depositio pecuniae* (i.e. *condita ab ignotis dominis tempore vetustiore mobilia*, C. 10, 15), so long hidden that at the time of its discovery the owner can no longer be ascertained. It is for this reason that the treasure is regarded by many as a *res nullius*, and that the finder acquires it by right of discovery (*occupatio*). Hence *thesaurus* differs from other finding where the owner may be ascertainable. On the other hand, it seems that the owner of land had a qualified interest in treasure found on his premises, hence the rule ascribed to Hadrian, that the finder and the owner of the soil share the treasure equally. If the owner were the finder, the treasure was his. Hadrian extended the rule so that the entire treasure, if found in a place having no owner (*i.e.* in a *res nullius*, *e.g.* a *locus religiosus* or *sacer*) and without search (*fortuito casu*), fell to the finder. M. Aurelius and Verus modified this rule so that one half of such finds fell to the *fiscus*, as in the case of treasure found on public property.

Acquisition of Ownership (*Iure Civili*)

Ulp. 19, 3

Mancipatio propria species alienationis est rerum mancipi, eaque fit certis verbis, libripende et quinque testibus praesentibus. Mancipatio locum habet inter cives Romanos et Latinos colonarios Latinosque Iunianos eosque peregrinos, quibus commercium datum est. Commercium est emendi vendendique invicem ius.

Gai. 1, 119

Est autem mancipatio imaginaria quaedam venditio; quod et ipsum ius proprium civium Romanorum est, eaque res ita agitur: adhibitis non minus quam quinque testibus civibus Romanis puberibus et prae-

1. **Mancipatio propria species alienationis**: property in cases of *res mancipi* was not transferred unless all the formalities required by law were observed. If any of the particulars failed, the object of the transfer was held to be merely in possession (*in bonis*) of the grantee, until he obtained a title to the thing by prescription (*usucapio*). *Res nec mancipi* did not require these formalities and were acquired by simple tradition or delivery (*traditio*). Plautus illustrates this principle in scenes where purchasers of slaves are cheated out of their property (and the price paid) by an accomplice of the seller setting up a claim for the slaves as his own before the purchasers' possession has ripened into ownership. The requirements of the text represent the transaction as it was in the classical law. Originally *mancipium* was a real sale, in which the price was actually weighed out by the scale bearer. Coined money was in use as early as the Twelve Tables. The ceremony then became symbolical, in which the fiction of weighing out the purchase money was preserved. The transaction thereupon came to be open to those *Latini* and *peregrini* who had the *ius commercii*.

4. **Latinos Iunianos**: see note on *Libertorum*, p. 89.

11. **quinque testibus civibus Romanis**: it was necessary that there should be present the one acquiring (*qui mancipio accipit*); the one alienating (*a quo mancipio accipit*); the scale bearer (*libripens*); and five witnesses, representing the community. The

terea alio eiusdem condicionis, qui libram aeneam teneat, qui appellatur libripens, is, qui mancipio accipit, aes tenens ita dicit: 'Hunc ego hominem ex iure Quiritium meum esse aio isque mihi emptus esto hoc aere aeneaque libra,' deinde aere percutit libram idque aes dat ei, a quo mancipio accipit, quasi pretii loco. Eo modo et serviles et liberae personae mancipantur; animalia quoque, quae mancipi sunt, quo in numero habentur boves, equi, muli, asini, item praedia tam urbana quam rustica, quae et ipsa mancipi sunt, qualia sunt Italica, eodem modo solent mancipari. In eo solo praediorum mancipatio a ceterorum mancipatione differt, quod personae serviles et liberae, item animalia, quae mancipi sunt, nisi in praesentia sint, mancipari non possunt; adeo quidem, ut eum, qui mancipio accipit, adprehendere id ipsum, quod ei mancipio datur, necesse sit; unde etiam mancipatio dicitur, quia manu res capitur; praedia vero absentia solent mancipari. Ideo autem aes et libra adhibetur, quia olim aereis tantum nummis ute-

number five is not accounted for in the sources, but the presumption is that there was one witness each for the five classes of the Servian Constitution.

2. **qui mancipio accipit**: for a discussion of the syntax of *mancipio* and the meaning of the word in these phrases, see Roby, *Lat. Gram.* II, Pref. p. 50, footnote.

6. **liberae personae mancipantur**: for free persons *in mancipio*, see note on *aliae*, p. 128.

17. **praedia absentia solent mancipari**: immovable things were not seized with the hand in mancipation, but were described only. In primitive times, undoubtedly, it was necessary that the entire ceremony should take place on the spot where the thing sold was situated, but in later times a field was represented by a clod (*glaeba*), a house by a brick, etc. (*res mobiles non nisi praesentes mancipari possunt, et non plures quam quot manu capi possunt. Immobiles autem etiam plures simul et quae diversis locis sunt mancipari possunt*, Ulp. 19, 6). — **aes et libra adhibetur**: bronze (*aes*) was the only metal used in ancient Roman currency. It was a mixture of copper, tin, and lead.

bantur, et erant asses, dupundii, semisses, quadrantes, nec ullus aureus vel argenteus nummus in usu erat, sicut ex lege duodecim tabularum intellegere possumus; eorumque nummorum vis et potestas non in numero erat, sed in pondere; asses librales erant, et dupundii; unde etiam dupundius dictus est, quasi duo pondo, quod nomen adhuc in usu retinetur. Semisses quoque et quadrantes pro rata scilicet portione ad pondus examinati erant. Qui dabat olim pecuniam, non numerabat eam, sed appendebat; unde servi, quibus permittitur administratio pecuniae, dispensatores appellati sunt.

Ulp. 19, 9

In iure cessio quoque communis alienatio est et mancipi rerum et nec mancipi: quae fit per tres personas, in iure cedentis, vindicantis, addicentis. In

It is not known when bronze was first coined. At the time of the Twelve Tables it was used, and some maintain that it was introduced then; by others it is held to have been first coined by Servius Tullius. Silver currency was introduced 269 B.C., and gold not until the later years of the republic. As stated in the text, the primitive Roman currency was one of weight (*in pondere*). As the unit of value was the *as*, the system of coinage was identical with the system of weights. The *as* originally weighed one pound (*libra*) and was divided into twelve ounces (*unciae*). Each fraction of the *as* following this duodecimal system had its distinct name: *uncia* ($\frac{1}{12}$), *sextans* ($\frac{1}{6}$), *quadrans* ($\frac{1}{4}$), *semissis* ($\frac{1}{2}$). *septunx* ($\frac{7}{12}$), *deunx* ($\frac{11}{12}$), etc. Before Justinian's reorganization of the prescribed courses of study in the law schools, *dupondii* ('two-pennymen') was the name given in derision to the students of the first year (*novi Iustinianei*).

12. **In iure cessio**: *in iure cessio* was an ancient form of alienating both *res mancipi* and *res nec mancipi*. It was a fictitious process followed by a formal surrender in court (*in iure*). The defendant (*dominus*) gave up (*cessit*) the thing in dispute to the plaintiff (*vindicator*) in the presence of the magistrate. The grantor yields either expressly or tacitly, and as there is no contest over the object claimed (*vindicare*, 'to claim'; *vindicator*, 'the claimant or grantee') the magistrate, repre-

iure cedit dominus; vindicat is, cui ceditur; addicit praetor. In iure cedi res etiam incorporales possunt, velut ususfructus et hereditas et tutela legitima libertae.

Gai. 2, 24

In iure cessio autem hoc modo fit: apud magistratum populi Romani, veluti praetorem, is, cui res in iure ceditur, rem tenens ita dicit: 'Hunc ego hominem ex iure Quiritium meum esse aio,' deinde postquam hic vindicaverit, praetor interrogat eum, qui cedit, an contra vindicet; quo negante aut tacente tunc ei, qui vindicaverit, eam rem addicit; idque legis actio vocatur. Hoc fieri potest etiam in provinciis apud praesides earum. Plerumque tamen et fere semper mancipationibus utimur. Quod enim ipsi per nos praesentibus amicis agere possumus, hoc non est necesse cum maiore difficultate apud praetorem aut apud praesidem provinciae agere.

Vsvcapio

Modest. D. 41, 3, 3

Vsucapio est adiectio dominii per continuationem possessionis temporis lege definiti.

senting the community or sovereign power, adjudges the property in the thing to the plaintiff. *In iure cessio* was used extensively to effect manumission (the *vindex* or *assertor libertatis* acting as claimant) and in the removal and establishment of paternal rights, *e.g. manumissio vindicta*, followed by *in iure cessio* in emancipation and adoption. Cf. also note on *Vindicta*, p. 90.

10. **eam rem addicit**: the praetor in the full exercise of his office made use of the three formal words: *do*, *dico*, *addico*. *Do* was employed in granting actions, interdicts, *iudices*, etc.; *dico*, in pronouncing sentence; *addico*, in awarding the object in dispute to one or the other of the parties (*vocantur dies nefasti, per quos dies nefas fari praetorem: do, dico, addico*, Varro, *L. L.* 6, 30). For *legis actio* see note on *ex his*, p. 49.

16. **Vsucapio**: *usucapio* was also recognized by the *ius civile* as a mode of acquisition by original title. *Vsucapio* (*usu* + *capere*,

Gai. D. 41, 3, 1

Bono publico usucapio introducta est, ne scilicet quarundam rerum diu et fere semper incerta dominia essent, cum sufficeret dominis ad inquirendas res suas statuti temporis spatium.

Gai. 2, 41

Nam si tibi rem mancipi neque mancipavero neque in iure cessero, sed tantum tradidero, in bonis quidem tuis ea res efficitur, ex iure Quiritium vero mea permanebit, donec tu eam possidendo usucapias; semel enim inpleta usucapione proinde pleno iure incipit, id est et in bonis et ex iure Quiritium tua res esse, ac si ea mancipata vel in iure cessa esset. Vsucapio autem mobilium quidem rerum anno completur, fundi vero et aedium biennio; et ita lege XII tabularum cautum est.

'taking by use') was a possession without interruption for one year in case of a movable thing and for two years in case of land or buildings, where the property was situated in Italy, if the possession had begun honestly (*bona fide*) and if the thing was not excluded from *usucapio* by special provision of law, *e.g. res furtivae, res sacrae*, etc. See below. The institution of usucapion was demanded by public policy, in order that there should be no vacuum of ownership (*ne incerta dominia essent*) and to prevent the title to property from remaining forever insecure and uncertain. This might occur when the form of conveyance had been imperfect or when the thing was acquired from a non-owner who had no right to convey (*nemo plus iuris ad alium transferre potest quam ipse haberet*, D. 50, 17, 54).

6. in bonis tuis ea res efficitur: the *ius civile* required that a *res mancipi* be conveyed by *mancipatio* or *in iure cessio*. If any of the requirements of this formal transaction failed, the thing could not become the property of the alienee by simple delivery (*traditio*), but was said to be merely '*in bonis eius*,' while the alienor continued to be the real owner. This defect in the form of conveyance could be cured by *usucapio*, and full ownership (*pleno iure*) could be acquired by the possessor if he continued to possess for the required period of time. *Vsucapio* is an institution mentioned by the Twelve Tables. *Mancipatio* and *in iure cessio* are both older. (Cf. Cic. *Top.* 4, 23, *usus auctoritas*

Inst. 2, 6

Iure civili constitutum fuerat, ut, qui bona fide ab eo, qui dominus non erat, cum crediderit eum dominum esse, rem emerit vel ex donatione aliave qua iusta causa acceperit, is eam rem, si mobilis erat, anno ubique, si immobilis, biennio tantum in Italico solo usucapiat, ne rerum dominia in incerto essent. Et cum hoc placitum erat, putantibus antiquioribus dominis sufficere ad inquirendas res suas praefata tempora, nobis melior sententia resedit, ne domini maturius suis rebus defraudentur neque certo loco beneficium hoc concludatur. Et ideo constitutionem super hoc promulgavimus, qua cautum est, ut res quidem mobiles per triennium usucapiantur, immobiles vero

fundi biennium est — ceterarum rerum omnium annuus est usus).

4. **iusta causa acceperit**: in considering the subject of usucapion, it is necessary to understand that possession (*possessio*) means both the physical detention of a thing (*detentio*) — the popular meaning of the word — and the intention (*animus*) to hold it as one's own. In the sense of the *ius civile*, then, legal possession requires both *detentio* and *animus*. In order that such a possession should ripen into ownership by lapse of time, the possession must have begun *bona fide* and *ex iusta causa* (or *iusto titulo*), *i.e.* the one beginning the possession must have begun in good faith and as a result of one of the legally recognized modes of acquiring title to property, as sale, gift, legacy, etc. The possession must be peaceable and uninterrupted, but the term of a predecessor's possession could be added to that of a successor to complete the required period of possession (*accessio possessionis*).

10. **certo loco beneficium hoc concludatur**: in the time of Justinian there was no distinction between Italian and provincial soil, and hence the principle of usucapion was not confined to Italy (*Italicum solum*). Owing to the greatly increased extent of Roman territory and the greater distances at which property might be situated from its owner, the prescriptive periods were also lengthened. *Inter praesentes* meant when the owner and the possessor resided in the same province; *inter absentes*, in different provinces. Where the parties were only a part of the time in the same province, two years of absence were counted equal to one of presence.

per longi temporis possessionem, id est inter praesentes decennio, inter absentes viginti annis usucapiantur et his modis non solum in Italia, sed in omni terra, quae nostro imperio gubernatur, dominium rerum iusta causa possessionis praecedente adquiratur.

Gai. 2, 45

Sed aliquando etiamsi maxime quis bona fide alienam rem possideat, non tamen illi usucapio procedit, velut si quis rem furtivam aut vi possessam possideat; nam furtivam lex XII tabularum usucapi prohibet, vi possessam lex Iulia et Plautia. Item provincialia praedia usucapionem non recipiunt. Item olim mulieris, quae in agnatorum tutela erat, res mancipi usucapi non poterant,

1. **per longi temporis possessionem**: *usucapio* and *longi temporis possessio*, or *praescriptio*, were by origin entirely distinct and different terms. The former was an institution of the *ius civile*, the latter of the *ius honorarium* or praetorian law. *Praescriptio* was a term of procedure introduced by provincial governors, since *usucapio* did not apply to provincial soil, where there could be no ownership *ex iure Quiritium*. The *praescriptio* was literally a plea written at the beginning (*prae-scribere*) of the formula, setting forth the fact of long and continuous possession on the part of the defendant. The praetor then came to give the possessor an action against third parties, who claimed the thing possessed (*actio in rem*), protecting the possessor as owner. Justinian united the two principles of *usucapio* and *longi temporis possessio*, the long period of ten and twenty years being retained for real estate, and the short period of *usucapio* for movable property was extended to three years.

7. **non illi usucapio procedit**: *usucapio* can ripen into ownership only when the mode of acquisition is legal. It may proceed where an error of fact occurred in the conveyance, if such error of fact is reasonable and *bona fide*. An error of law, however, renders the effect of the possession void. Certain things were not susceptible to usucapion, *e.g.* things stolen (*res furtivae*); things taken by violence (*res vi possessae*): land in provincial soil (*provinciale solum*); *res mancipi* belonging to a woman in the guardianship of her agnates (cf. note on *Veteres*, p. 152); all things incapable of private ownership

praeterquam si ab ipsa tutore auctore traditae essent; idque ita lege XII tabularum cautum erat. Item liberos homines et res sacras et religiosas usucapi non posse manifestum est. Quod ergo vulgo dicitur furtivarum rerum et vi possessarum usucapionem per legem XII tabularum prohibitam esse, non eo pertinet, ut ne ipse fur quive per vim possidet usucapere possit (nam huic alia ratione usucapio non competit, quia scilicet mala fide possidet); sed nec ullus alius, quamquam ab eo bona fide emerit, usucapiendi ius habeat.

Subordinate Rights of Ownership (*Iura in re aliena*)

Servitudes

Marcian. D. 8, 1, 1

Servitudes aut personarum sunt, ut usus et ususfructus, aut rerum, ut servitutes rusticorum praediorum et urbanorum.

(*extra commercium*), such as free persons, *res sacrae*, *res religiosae*, *res fisci*, etc.

8. **nec ullus alius**: a thing stolen or taken by violence was regarded as tainted (*in vitium cecidisse*) until it fell again into the hands of the real owner. In order that the taint should be removed (*vitio purgato*) so that *usucapio* might proceed, the thing must come into the owner's hands lawfully and with his knowledge that it had been stolen and was his property.

Subordinate Rights of Ownership: *dominium* was the word employed by the Romans to express complete ownership. It embraced, therefore, the *ius utendi*, *ius fruendi*, *ius abutendi*, or rights of complete disposition of the property. *Dominium* means that all these rights are united in the *dominus*. But certain rights may be detached from *dominium* and vested in another than the *dominus*, *e.g.* a right to use a thing in a particular way, as a right of way through another's field. This is *dominium*, or absolute ownership minus a detached portion of ownership, *i.e.* a limited right or servitude in the property of another. These limited rights which one properly entitled may exercise over another's property are called *iura in re* or *iura in re aliena* (cf. also note on *Acquisition of Ownership*, p. 165). They

Pompon. D. 8, 1, 15, 1 Servitutium non ea natura est, ut aliquid faciat quis, veluti viridia tollat aut amoeniorem prospectum praestet, aut in hoc ut in suo pingat, sed ut aliquid patiatur aut non faciat.

5 Ulp. D. 8, 5, 6, 2 Etiam de servitute, quae oneris ferendi causa imposita erit, actio nobis competit, ut et onera ferat et aedificia reficiat ad eum modum, qui servitute imposita comprehensus est. Et Gallus putat non posse ita

are real rights, *i.e.* availing against all the world, like the rights of complete ownership. They are detached portions of proprietary right taken from the *dominus* and conferred upon another. What remains after the *ius in re* has been subtracted, the Romans call *nuda proprietas*. How do *iura in re aliena* differ from absolute ownership? They are mere 'fragments' of *dominium*, limited in their content, and when they perish as distinct rights, are absorbed by *dominium*. The most important *iura in re aliena* are *servitutes*, *emphyteusis*, *superficies*, and *pignus* (*hypotheca*).

Servitudes: a servitude is a real right (*ius in re aliena*) in the property of another, inseparably connected with an immovable thing (*praedium*) or with a certain person for whose benefit it exists (*servitutes personarum aut rerum*, personal and real). In origin the term *servitus* is metaphorical. The thing whose ownership is restricted is said to serve (*servit*, *res serviens*), the restricting right or burden is called *servitus*. The thing benefited by such service is called dominant (*res dominans*). Where property was freed from servitudes, there was said to be a *libertas rei*.

3. aut in hoc ut in suo pingat: 'the essence of servitudes does not consist in this, that any one should do something, as *e.g.* remove bushes or furnish a more pleasing view, or that he display pictures on his own property for this purpose' (i.e. *amoeniorem prospectum praestet*). *In suo pingat* refers to the practice of decorating walls and other surfaces with paintings and frescoes for the purpose of beautifying the landscape. This practice is referred to by Juv. *Sat.* 8, 157. Cf. also Dig. 43, 17, 3, 9. Such 'coverings' of paint and fresco were called *tectoria*. — **sed ut aliquid patiatur**: servitudes are classified as positive or negative. In the latter case the owner of the *res serviens* is bound to refrain from doing what he would otherwise be entitled to do (*servitutes quae in non faciendo consis-*

servitutem imponi, ut quis facere aliquid cogeretur, sed ne me facere prohiberet; nam in omnibus servitutibus refectio ad eum pertinet, qui sibi servitutem adserit, non ad eum, cuius res servit. Sed evaluit Servi sententia, in proposita specie ut possit quis defendere ius sibi esse cogere adversarium reficere parietem ad onera sua sustinenda. Labeo autem hanc servitutem non hominem debere, sed rem, denique licere domino rem derelinquere scribit.

Praedial Servitudes

Paul. D. 8, 1, 1, 3

Servitutes praediorum aliae in solo, aliae in superficie consistunt.

Inst. 2, 3, 1

Praediorum urbanorum sunt servitutes, quae aedificiis inhaerent, ideo urbanorum praediorum dictae, quoniam aedificia omnia urbana praedia appellantur, etsi in villa aedificata sunt. Item praediorum urbanorum servitutes sunt hae: ut vicinus onera vicini sustineat; ut in parietem eius liceat vicino tignum immittere; ut stil-

tunt). In the former case, the owner of the *res dominans* is allowed to do something (by the positive servitude) he would otherwise not be entitled to do (*servitutes quae in patiendo consistunt*). Servitudes do not consist in doing something (*servitus in faciendo consistere non potest*). For this reason the cost of repairs and maintenance fall upon the owner of the dominant tenement, except in the servitude *oneris ferendi* mentioned in the text. Even here the owner of the servient tenement may avoid the burden of repairs by abandoning the servient thing (*derelinquere*).

9. **Servitutes praediorum aliae**: praedial (real) servitudes are either rural or urban, *i.e.* they pertain to the soil (*aliae in solo consistunt*) or to superstructures (*aliae in superficie consistunt*). All praedial servitudes are burdens imposed upon a *thing* in favor of another thing, as a right of way through one piece of land in favor of another piece of land adjoining it — or a right to discharge rain water from one's roof upon the property of a neighbor, etc.

licidium vel flumen recipiat quis in aedes suas vel in aream, vel non recipiat; et ne altius tollat quis aedes suas, ne luminibus vicini officiatur.

Gai. D. 8, 2, 2 — Vrbanorum praediorum iura talia sunt: altius tollendi et officiendi luminibus vicini aut non extollendi; item stillicidium avertendi in tectum vel aream vicini aut non avertendi; item immittendi tigna in parietem vicini et denique proiciendi protegendive ceteraque istis similia.

Ulp. D. 8, 2, 3 — Est et haec servitus, ne prospectui officiatur.

Paul. D. 8, 2, 4 — Luminum in servitute constituta id adquisitum videtur, ut vicinus lumina nostra excipiat; cum autem servitus imponitur, ne luminibus officiatur, hoc

4. **Vrbanorum praediorum**: servitudes are called urban when they pertain directly to buildings, whether situated in town or country. The most usual urban servitudes are mentioned in the text. By the servitude *altius tollendi* the owner of the dominant tenement was entitled to erect buildings beyond a certain height; by the negative servitude *non extollendi*, the owner of the servient tenement was bound not to raise his buildings beyond a certain height. The servitude *officiendi luminibus vel prospectui* restrained the proprietor of the servient tenement from obstructing the light and prospect of his neighbor by the erection of buildings or the planting of trees, etc. Otherwise an owner might erect structures on his own property to whatever height he pleased (*cuius est solum, eius est usque ad caelum*). The servitude *stillicidium avertendi aut non avertendi* has reference to drip from the eaves (*stilla-cadere*, 'falling in drops') falling upon a neighbor's property. When the water was collected and carried from the roof by a gutter, it was called *flumen*. In neither case could the water be turned upon a neighbor's land, in the absence of a servitude. The *ius tigni immittendi* is the right to fasten a joist or timber in a neighbor's wall. The *ius proiciendi protegendive* is the right to build beyond one's boundary line in the air above another's property, *e.g.* a balcony or the projection of beams, or a roof, over another's soil or building.

maxime adepti videmur, ne ius sit vicino invitis nobis altius aedificare atque ita minuere lumina nostrorum aedificiorum.

Ulp. D. 8, 2, 15 Inter servitutes ne luminibus officiatur et ne prospectui offendatur aliud et aliud observatur: quod in prospectu plus quis habet, ne quid ei officiatur ad gratiorem prospectum et liberum, in luminibus autem, non officere ne lumina cuiusquam obscuriora fiant.

Paul. D. 8, 2, 16 Lumen id est, ut caelum videretur, et interest inter lumen et prospectum: nam prospectus etiam ex inferioribus locis est, lumen ex inferiore loco esse non potest.

Ulp. D. 8, 3, 1 Servitutes rusticorum praediorum sunt hae: iter, actus, via, aquaeductus. Iter est ius eundi ambulandi homini, non etiam iumentum agendi. Actus

The *servitus luminum*, or the *ius luminis immittendi*, is the right to have a window in a neighbor's wall (*ut vicinus lumina nostra excipiat*).

3. **Inter servitutes ne luminibus et ne prospectui**: the difference (*aliud et aliud*) between these two servitudes is that the *servitus ne prospectui offendatur* is more extensive than the servitude *ne luminibus officiatur*, since prospect may be obstructed or rendered less pleasing in various ways, without diminishing light. The servitude of light is more extensive than the servitude *altius non tollendi*, since other things than buildings may obstruct the light, *e.g.* the planting of trees, etc.

8. **interest inter lumen et prospectum**: *lumina* were windows or openings in a building for purposes of lighting it. *Prospectus* is the view below, upon a garden or surrounding park, as well as in other directions.

12. **Servitutes rusticorum praediorum**: the most common servitudes pertaining to land are: way (*iter, actus, via*); conduct of water to one's own land over, beneath, or on the surface of another's land (*aquaeductus*); drawing water from another's well (*aquaehaustus*), carrying with it an implied right of way (*iter*); the right to water stock (*pecoris ad aquam adpulsus*) with implied way (*actus*); right of pasturage (*ius pascendi*); right of burning lime (*calcis coquendae*); the right to conduct or drain water from one's own land to another's (*aquae conducendae*

est ius agendi vel iumentum vel vehiculum; itaque qui iter habet, actum non habet, qui actum habet, et iter habet etiam sine iumento. Via est ius eundi et agendi et ambulandi; nam et iter et actum in se via continet. Aquaeductus est ius aquam ducendi per fundum alienum. In rusticis computanda sunt aquaehaustus, pecoris ad aquam adpulsus, ius pascendi, calcis coquendae, harenae fodiendae.

Paul. D. 8, 3, 7

Qui sella aut lectica vehitur, ire, non agere dicitur; iumentum vero ducere non potest, qui iter tantum habet. Qui actum habet, et plostrum ducere et iumenta agere potest. Sed trahendi lapidem aut tignum neutri eorum ius est; quidam nec hastam rectam ei ferre licere, quia neque eundi neque agendi gratia id faceret et possent fructus eo modo laedi. Qui viam habent, eundi agendique ius habent; plerique et trahendi quoque et rectam hastam referendi, si modo fructus non laedat.

Gai. D. 8, 3, 8

Viae latitudo ex lege duodecim tabularum in porrectum octo pedes habet, in anfractum, id est ubi flexum est, sedecim.

vel immittendae). There were many rural servitudes not mentioned in the text.

4. iter et actum in se via continet: the *servitus viae* not only includes *iter* and *actus*, but differs from them in that it was a right of paved way for heavily loaded wagons. For this reason, the dragging of stone, heavy timber, etc., was permitted only by the *servitus viae*, since by such use the servient property was not injured and the dominant owner injured only his own road which he was bound to maintain.

12. quidam (sc. *credunt*) **nec hastam rectam:** some believe that he is not allowed to carry a spear upright, because this would be no part of a servitude *eundi* or *agendi*.

14. Qui viam habent: those who have the *servitus viae* have also the *ius eundi agendique*, and very many add also, the *ius trahendi et rectam hastam referendi*.

17. Viae latitudo ex lege duodecim: this was the statutory provision for the width of the way, in the absence of special agreement to the contrary. If nothing was agreed upon regarding the width of *iter*

Ulp. D. 8, 4, 1, 1

Ideo autem hae servitutes praediorum appellantur, quoniam sine praediis constitui non possunt; nemo enim potest servitutem adquirere vel urbani vel rustici praedii, nisi qui habet praedium.

5 Paul. D. 8, 2, 28

Omnes autem servitutes praediorum perpetuas causas habere debent, et ideo neque ex lacu neque ex stagno concedi aquaeductus potest. Stillicidii quoque immittendi naturalis et perpetua causa esse debet.

• or *actus*, the matter was determined by the judge (*si nihil dictum est, hoc ab arbitro statuendum est. In via aliud iuris est: nam si dicta latitudo non est, legitima debetur*, D. 8, 3, 13, 2).

1. **servitutes praediorum appellantur**: the owner of a piece of land is placed in partial subjection to his neighbor. The sources state that the land serves neighboring land (*fundus servit fundo, praedium servit praedio*). There must always be two pieces of land, having different owners. The land benefiting by the servitude (*cui debetur servitus*, or *quod habet servitutem*) is called by moderns *praedium dominans*. The land burdened by the servitude (*quod debet servitutem*), the Romans called *praedium serviens*. Since these servitudes were attached to land, the Romans regarded them as serving the land directly. As to the question whether *land* can have rights, see the interesting chapter in Holmes, "The Common Law," p. 383 f.

5. **perpetuas causas habere**: a servient tenement must from its natural character be capable of being of constant advantage (*perpetua causa*) to the dominant tenement, regardless of change of ownership of the land. '*Servitus fundo utilis esse debet*' (*ut pomum decerpere liceat, et ut spatiari, et ut cenare in alieno possimus, servitus imponi non potest*, D. 8, 1, 8).

Personal Servitudes: personal servitudes are those conferring upon individual *persons* rights which may be exercised over the property of another (*praedium servit personae*), just as real (praedial) servitudes are imposed upon a thing in favor of another thing (*praedium servit praedio*). Personal servitudes are strictly personal rights, extinguished at death and, unlike real servitudes, they may be imposed upon movable, as well as immovable, property. Less narrowly defined in scope than real servitudes, they are much more limited in duration. Personal servitudes, at the most,

Personal Servitudes

Paul. D. 7, 1, 1 Vsus fructus est ius alienis rebus utendi fruendi salva rerum substantia.

Gai. D. 7, 1, 3, 1 Constitit autem usus fructus non tantum in fundo et aedibus, verum etiam in servis et iumentis ceterisque rebus.

Ulp. D. 7, 1, 68 Vetus fuit quaestio, an partus ad fructuarium pertineret; sed Bruti sententia optinuit fructuarium in eo locum non habere; neque enim in fructu hominis homo esse potest. Hac ratione nec usum fructum in eo fructuarius habebit.

were for the lifetime of the person served. Real servitudes, in the absence of other reasons, might be perpetual or they might continue at least as long as the servient tenement existed. The most common personal servitudes are: *ususfructus*, *usus*, *habitatio*, and *operae servorum et animalium*.

1. **Vsus fructus est ius alienis rebus**: *ususfructus* is the most comprehensive of the personal servitudes. The one entitled (*usufructuarius*) has the exclusive right to use and enjoy (*ius utendi et fruendi*) the property of another, including its increase, products, and income (*fructus naturales et civiles*), provided the value of the servient thing is not impaired (*salva rerum substantia*). But see note on *Fructuarius causam proprietatis* below, p. 196.

6. **partus ad fructuarium pertineret**: *partus*, offspring (sc. *ancillae*), is commonly used of the child of a female slave. Inasmuch as there was a usufruct of slaves as well as of other movable property, such as flocks, it was a question whether the *usufructuarius* (*fructuarius*) was entitled to the usufruct of the offspring of slaves as well as of flocks. It might be expected that the young of slaves should be treated like the young of flocks and beasts of burden. Ulpian explains that slaves are not owned primarily for breeding purposes (*non temere ancillae eius rei causa comparantur ut pariant*). But this is true also of cows and mares, whose young were *in fructu*. Justinian, following Gaius, adopts the decision of the text, basing it upon the superior position and dignity of human beings (*partus vero ancillae in fructu non est, itaque ad dominum proprietatis pertinet: absurdum enim videbatur homi-*

Ulp. D. 7, 1, 13, 4

Fructuarius causam proprietatis deteriorem facere non debet, meliorem facere potest. Et aut fundi est usus fructus legatus, et non debet neque arbores frugiferas excidere neque villam diruere nec quicquam facere in perniciem proprietatis. Et si forte voluptarium fuit praedium, virdiaria vel gestationes vel deambulationes arboribus infructuosis opacas atque amoenas habens, non debebit deicere, ut forte hortos olitorios faciat vel aliud quid, quod ad reditum spectat. Inde est quaesitum, an lapidicinas vel cretifodinas vel harenifodinas ipse instituere possit; et ego puto etiam ipsum instituere posse, si non agri partem necessariam huic rei occupaturus est. Proinde venas quoque lapidicinarum et huiusmodi metallorum inquirere poterit; ergo et auri et argenti et sulpuris et aeris et ferri et ceterorum fodinas vel quas paterfamilias instituit exercere poterit vel ipse instituere, si nihil agriculturae nocebit. Et si forte in hoc quod insti-

nem in fructu esse, cum omnes fructus rerum natura hominum gratia comparavit, Inst. 2, 1, 37).

1. **Fructuarius causam proprietatis**: the *usufructuarius* was bound to make proper use of the servient property (*arbitratu boni viri*) and to restore it to its former condition upon the termination of the servitude. The proprietor (*proprietatis dominus*) took security (*cautio*) from the *usufructuarius* by which the latter was personally obliged to make good all losses and deterioration. From the nature of usufruct there can be no such servitude in consumable things (*res quae usu consumuntur*). A SC of the early empire allowed a *quasi ususfructus* of things consumable, preceded by security for indemnity or restoration of the same quantity and quality, or for the payment of the money value of the thing consumed (*e.g. vini, olei, frumenti ususfructus*). Although the *ususfructus* is a personal servitude, the one entitled to it may, by agreement, allow another to exercise the usufruct either gratuitously or for a compensation. The right, however, itself is not transferable, and the *usufructuarius* is responsible to the owner of the servient property (*i.e.* owner of the *nuda proprietas*) for proper care and use.

tuit plus reditus sit quam in vineis vel arbustis vel olivetis quae fuerunt, forsitan etiam haec deicere poterit, si quidem ei permittitur meliorare proprietatem.

Inst. 2, 5, pr. Isdem istis modis, quibus usus fructus constituitur, etiam nudus usus constitui solet isdemque illis modis finitur, quibus et usus fructus desinit. Minus autem scilicet iuris in usu est quam in usu fructu. Namque is, qui fundi nudum usum habet, nihil ulterius habere intellegitur, quam ut oleribus, pomis, floribus, feno, stramentis, lignis ad usum cottidianum utatur; in eoque fundo hactenus ei morari licet, ut neque domino fundi molestus sit neque his, per quos opera rustica fiunt, impedimento sit; nec ulli alii ius quod habet aut vendere aut locare aut gratis concedere potest, cum is qui usum fructum habet potest haec omnia facere. Item is, qui aedium usum habet, hactenus iuris habere intellegitur, ut ipse tantum habitet, nec hoc ius ad alium transferre potest; et vix receptum videtur, ut hospitem ei recipere liceat. Et cum uxore sua liberisque suis, item libertis nec non aliis liberis personis, quibus non minus quam servis utitur, habitandi ius habeat; et convenienter si ad mulierem usus aedium pertineat, cum marito habitare liceat.

Ulp. D. 7, 8, 12, 1 Praeter habitationem quam habet, cui usus datus est deambulandi quoque et gestandi ius

5. **nudus usus constitui solet**: the servitude *usus* is limited to the mere use of the thing, not to its fruits (*cui usus relictus est, uti potest, frui non potest*, D. 7, 8, 2) beyond what was required for the daily needs of the user and his family. It was, therefore, a much more restricted servitude than *ususfructus*. The user originally could not take any fruits, natural or civil, but this was modified by interpretation in his favor, so that he was allowed sufficient for his daily requirements. He was obliged to furnish the *cautio usuaria* to indemnify the proprietor against loss or damage.

habebit. Sabinus et Cassius et lignis ad usum cottidianum et horto et pomis et holeribus et floribus et aqua usurum, non usque ad compendium, sed ad usum, scilicet non usque ad abusum; idem Nerva, et adicit stramentis et sarmentis etiam usurum, sed neque foliis neque oleo neque frumento neque frugibus usurum. Sed Sabinus et Cassius et Labeo et Proculus hoc amplius etiam ex his quae in fundo nascuntur, quod ad victum sibi suisque sufficiat sumpturum et ex his quae Nerva negavit; Iuventius etiam cum convivis et hospitibus posse uti; quae sententia mihi vera videtur.

Inst. 2, 5, 3

Item is, ad quem servi usus pertinet, ipse tantum operis atque ministerio eius uti potest: ad alium vero nullo modo ius suum transferre ei concessum est. Idem scilicet iuris est et in iumento. Sed si pecoris vel ovium usus legatus fuerit, neque lacte neque agnis neque lana utetur usuarius, quia ea in fructu sunt. Plane ad stercorandum agrum suum pecoribus uti potest. Sed si cui habitatio legata sive aliquo modo constituta sit, neque usus videtur neque usus fructus, sed quasi proprium aliquod ius. Quam habitationem habentibus propter rerum utilitatem secundum Marcelli sententiam nostra decisione promulgata permisimus non solum in ea degere, sed etiam aliis locare.

20. **quasi proprium aliquod ius**: *habitatio* was peculiar in that the one enjoying this servitude could permit another to exercise the right (in the law of Justinian) for compensation, and it was, furthermore, less restricted than *usus-fructus* and *usus* in that it was not lost by change of status (*capitis deminutio*) or by non-user. For other servitudes of a peculiar character in the law of Justinian, see *Class. Dict.*, articles *Emphyteusis* and *Superficies*.

The Law of Obligations (*Obligationes*)

Paul. D. 44, 7, 3 Obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum.

Gai. D. 50, 16, 11 Creditorum appellatione non hi tantum accipiuntur, qui pecuniam crediderunt, sed omnes, quibus ex qualibet causa debetur;

Ulp. D. 50, 16, 12 ut si cui ex empto vel ex locato vel ex alio ullo debetur. Sed et si ex delicto debeatur, mihi videtur posse creditoris loco accipi.

Mod. D. 50, 16, 108 Debitor intellegitur is a quo invito exigi pecunia potest.

1. **Obligationum substantia**: the essence of obligation is not to make a thing (*corpus*) or a servitude our own, but it is a legal relation existing between two persons whereby one of them (*creditor*) is entitled to compel the other (*debitor*) to some performance (*ad dandum*, etc.) having a money value (*debere* means 'to have less,' *de* + *habere*). *Obligatio* (*obligare*) indicates therefore a legal bond, the two parties being tied together by law. This bond may be established by the parties voluntarily (as by contract), or without their consent (as by delict). There is no important distinction between the words *dare*, *facere*, and *praestare*. *Facere*, 'to do something,' and *praestare*, 'to make good,' 'to compensate,' were often used for *dare*. In all cases the payment of a sum of money was the ultimate means of loosening the tie (*solutio*) established by an *obligatio*.

5. **Creditorum appellatione**: *creditor* and *debitor* are general terms signifying, respectively, the party entitled to a right arising from an obligation, and the party upon whom the duty of performance is imposed. *Debitor* is not merely one from whom payment is due in the English sense of debtor, but he is any one from whom money may be demanded against his will (*eo invito*), whether the obligation arises from a promise (*ex contractu*) or from a wrong (*ex delicto*), *ea enim in obligatione consistere, quae pecunia lui praestarique possunt*, D. 40, 7, 9, 2.

Inst. 3, 13, pr. Obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura.

Gai. D. 44, 7, 1 Obligationes aut ex contractu nascuntur aut ex maleficio aut proprio quodam iure ex variis causarum figuris.

Inst. 3, 13, 2 Sequens divisio in quattuor species diducitur: aut enim ex contractu sunt aut quasi ex contractu aut ex maleficio aut quasi ex maleficio. Prius est,

1. **Obligatio est iuris vinculum**: careful attention to the metaphor contained in this definition will assist toward a proper understanding of it. *Obligatio* (*ob* + *ligare*) is a binding, *i.e.* a legal bond (*iuris vinculum*) by which two parties are fastened together (*adstringere*) in such a way that one may be required to dissolve the bond by money payment (*necessitate alicuius solvendae rei*) under compulsion of law (*secundum nostrae civitatis iura*). It is the law that ties and unties the knot (*obligare*, *solvere*).

4. **Obligationes aut ex contractu**: all obligations arise from contract, from wrongs (*ex maleficio*), or from other relations of a legal character (*ex variis causarum figuris*) which the jurists assign by analogy to one or the other of the two main divisions of obligations (hence called *obligationes quasi ex contractu*, *quasi ex maleficio*). See text and notes below. Not every agreement in Roman law gives rise to a legally binding obligation. In the old *ius civile* only those promises were binding which were made in full conformity with the requirements of the law as regards their form and content. All other agreements were without legal effect (*nuda pacta*), *ex nudo pacto inter cives Romanos actio non nascitur*, Paul. 2, 14, 1. Later, *pacta* gave rise to an obligation by help of the praetor and special legislation (*pacta praetoria* and *legitima*). A promise made to the state or a solemn promise or vow (*votum*) made to a divinity (*i.e.* a mere promise without formal acceptance) gave rise to an obligation (*si quis rem aliquam voverit*, *voto obligatur*).

8. **quasi ex contractu**: obligations may also arise without agreement from a state of *facts* which render one person bound to another as if they had agreed, *e.g.* one person conducts another's business during the latter's absence to preserve his property from perishing or suffer-

ut de his quae ex contractu sunt dispiciamus. Harum aeque quattuor species sunt: aut enim re contrahuntur aut verbis aut litteris aut consensu. De quibus singulis dispiciamus.

Obligations ex Contractv

real contracts (*Re*)

Inst. 3, 14, pr. Re contrahitur obligatio veluti mutui datione. Mutui autem obligatio in his rebus consistit, quae pondere, numero, mensurave constant, veluti vino, oleo, frumento, pecunia numerata, aere, argento, auro, quas res aut

ing injury, called *negotiorum gestio*. The legal relations here between the parties resembled the obligations arising *ex contractu*, and the fictitious character of these bonds the jurists represented by the term *quasi-contractus*. *Obligationes quasi ex maleficio* (or *delicto*) were likewise similar to those arising *ex maleficio*, as when a passer-by was injured by something thrown from a window above. Regardless of the person perpetrating the wrongful act, the injured party was entitled to an action against the occupier of the house or room from which the act originated. See also text below (Obligations *quasi ex Delicto*, p. 255).

2. **aut enim re contrahuntur**: in the early law all contractual relations required a certain external formality to insure their validity. The oldest form of contract was *nexum* (*nectere*, bind), a bond entered into by *mancipatio* and *stipulatio*, consisting of the utterance of certain formal words (*verbis*). In the later law contracts could be concluded *re* (real contracts), *i.e.* by the very nature of their content, as by the intervention of a thing (*res*) delivered by one party to another; *litteris*, where the contract is based on a written acknowledgment of debt; *consensu*, where the contract arises from the mere consent of the parties, without formalities. Contracts arising *verbis* and *litteris* may be called formal, those arising *re* and *consensu*, informal.

5. **mutui datione**: *mutuum* is a gratuitous loan for *consumption*, the thing loaned to be returned in kind and quality only. For the false etymology see note on *curias*, p. 45. *Mutuum* is a *negotium stricti iuris*, and the action by which an equivalent in kind is enforced is

numerando aut metiendo aut pendendo in hoc damus, ut accipientium fiant et quandoque nobis non eaedem res, sed aliae eiusdem naturae et qualitatis reddantur. Vnde etiam mutuum appellatum sit, quia ita a me tibi datur, ut ex meo tuum fiat. Ex eo contractu nascitur actio quae vocatur condictio.

Inst. 3, 14, 2

Item is cui res aliqua utenda datur, id est commodatur, re obligatur et tenetur commodati actione. Sed is ab eo qui mutuum accepit longe distat: namque non ita res datur, ut eius fiat, et ob id de ea re ipsa restituenda tenetur. Et is quidem qui mutuum accepit, si quolibet fortuito casu quod accepit amiserit, veluti incendio, ruina, naufragio aut latronum hostiumve incursu, nihilo

called, therefore, *condictio* or *condictio certi*, *i.e.* an *actio* for the recovery of a fixed and definite thing — no more and no less. The thing loaned becomes the property of the borrower. He is not bound to pay interest (*e.g.* for money loan) unless an express contract to that effect has been entered into by *stipulatio*.

7. **res aliqua utenda**: *commodatum* is a loan for *use* only, the borrower being bound to return the identical thing borrowed, differing therein from *mutuum*. *Commodatum* is a *bonae fidei negotium*, *i.e.* the liability of the parties is not exactly determined and defined. The borrower is bound to bestow unusual care upon the thing, since he alone is benefited by the contract, but he is not liable for the usual wear and tear, nor for theft or accident (*casus*, *vis maior*) unless the thing has been put to other use than that contracted for. The lender, having no interest in the contract, is liable only for *dolus* ('intentional wrong, fraud') and *culpa lata* ('gross negligence'). Like *mutuum*, *commodatum* is strictly gratuitous, otherwise it becomes *locatio conductio* (*i.e.* a *contractus ex consensu*). The lender has the *actio commodati* (*directa*) for the recovery of the thing loaned. The borrower has the *actio commodati* (*contraria*) by which he may recover from the lender the amount of damage or expense which the thing may have caused (*e.g.* illness of a loaned slave, or damage caused by a vicious horse, supposed to be gentle).

minus obligatus permanet. At is qui utendum accepit sane quidem exactam diligentiam custodiendae rei praestare iubetur nec sufficit ei tantam diligentiam adhibuisse, quantam suis rebus adhibere solitus est, si modo alius diligentior poterit eam rem custodire; sed propter maiorem vim maioresve casus non tenetur, si modo non huius culpa is casus intervenerit; alioquin si id quod tibi commodatum est peregre ferre tecum malueris et vel incursu hostium praedonumve vel naufragio amiseris, dubium non est, quin de restituenda ea re tenearis. Commodata autem res tunc proprie intellegitur, si nulla mercede accepta vel constituta res tibi utenda data est. Alioquin mercede interveniente locatus

2. exactam diligentiam: *diligentia* is the care or skill which persons are required by law to exhibit in their conduct. It has different degrees: the usual diligence of ordinarily careful people; and a high degree of diligence expected from those especially qualified for the performance of their duties (*exacta diligentia*, *omnis diligentia*, *diligentia diligentis*, or *diligentissimi*, *patrisfamilias*). A person from whom this latter degree of diligence is exacted is liable even for a slight degree of negligence, measured by an absolute standard (*levis culpa in abstracto*, as called by moderns), *i.e.* if a more careful man could have prevented the injury (*si modo alius diligentior poterit eam rem custodire*). The degree of diligence otherwise required is that which a person ordinarily bestows upon his own affairs (*quantum suis rebus adhibere solitus est*). The standard is in this case relative, since one man exercises more care than another over his own affairs. A less degree of care than usual renders one liable for negligence (*culpa levis in concreto*, as named by moderns).

9. quin de restituenda ea re tenearis: by the contract called *commodatum*, the borrower is bound to exercise the highest degree of care, because the contract is entirely in his interest (*nulla mercede accepta*). Although the borrower is not liable for accidental loss or damage, if he use the thing for any other purpose or in any other way than that agreed upon, he becomes liable even for unavoidable accident (*casus*, *vis maior*). If compensation were paid (*mercede accepta*), this contract would be one of hiring or letting (*locatio-conductio*, see below, text, p. 217).

tibi usus rei videtur, gratuitum enim debet esse commodatum. Praeterea et is, apud quem res aliqua deponitur, re obligatur et actione depositi, qui et ipse de ea re quam accepit restituenda tenetur. Sed is ex eo solo tenetur, si quid dolo commiserit, culpae autem nomine, id est desidiae atque neglegentiae, non tenetur; itaque securus est qui parum diligenter custoditam rem furto amisit, quia, qui neglegenti amico rem custodiendam tradit, suae facilitati id imputare debet. Creditor quoque qui pignus accepit re obligatur, qui et ipse de ea ipsa re quam accepit restituenda tenetur actione pigneraticia. Sed quia pignus utriusque gratia datur, et debitoris, quo magis ei pecunia crederetur, et creditoris, quo magis ei in tuto sit creditum, placuit sufficere, quod ad eam rem custodiendam exactam diligentiam adhiberet; quam si praestiterit et aliquo fortuitu casu rem amiserit, securum esse nec impediri creditum petere.

2. **apud quem res aliqua deponitur**: *depositum* is a contract by which one party delivers to another a thing for safe-keeping without compensation. As this contract is for the benefit of the depositor, the depositee, deriving no benefit from it, is liable only for fraud (*dolus*) and wilful negligence (*culpa lata*). The depositor has the *actio depositi* (*directa*) for the recovery of the thing deposited; the depositee, the *actio depositi* (*contraria*) for the recovery of any expense which the custody of the thing entailed.

9. **Creditor qui pignus accepit re**: *pignus* is a contract arising from the delivery of a thing as a pledge. The creditor (pledgee) not only has a real right (*ius in rem*) in the thing pledged (as mortgagee), but he is also (*quoque*) bound by the delivery of the thing (*re*) to restore it to the pledgor (*debitor*) on certain conditions arising from the contract of *pignus*. The pledgee is bound to bestow the highest degree of care upon the thing, because he is directly interested in the contract. He is not responsible for *casus*, and may even recover the value of the pledge, if it perish by accident. The pledgor has the *actio pigneraticia* (*directa*) for the recovery of the pledge, after the payment of the debt secured by it. The pledgee has the *actio pigneraticia* (*contraria*) for the recovery of any expenses caused

Verbal Contracts (*Verbis*)

Inst. 3, 15, pr. Verbis obligatio contrahitur ex interrogatione et responsu, cum quid dari fierive nobis stipulamur.

Pompon. D. 45, 1, 5, 1 Stipulatio est verborum conceptio, quibus is qui interrogatur daturum facturumve se quod interrogatus est responderit.

Gai. 3, 92 Verbis obligatio fit ex interrogatione et responsione, veluti dari spondes? spondeo; dabis? dabo; promittis? promitto; fide promittis? fide promitto; fide iubes?

by the preservation of the pledge. Both parties being interested in this contract, they are equally answerable for *exacta diligentia*.

1. **Verbis obligatio contrahitur**: the contract arising *verbis* required the utterance of formal words, one party stating a question, the other giving a reply corresponding to the question. The obligation arising from this mode of contracting was binding in the absence of all consideration. Here the solemn form of words make the agreement valid, giving rise to a formal contract called *stipulatio*. A promise without the question to which it corresponded gave rise to a mere *nudum pactum*, which was not a valid agreement (*ex nudo pacto non oritur actio*). The Roman contract arising *verbis* should not be confused with the English parol contract. Unlike the latter, the Roman verbal contract is the most formal known to the Roman law. In its most ancient form, this contract required the use of the words *spondesne? spondeo*, which could be employed by Roman citizens only. The ancient *sponsio* was probably solemnized by a libation (cf. σπένδειν) and was of the nature of a solemn oath, or religious act which developed into a formal contract. In some instances, in the later law even, the *sponsio* retained the force of a moral obligation only, as, *e.g.* in betrothal (*sponsalia*), a promise which was not actionable. Cf. note on *Betrothal*, p. 119.

9. **promittis? promitto**: from very early times other words were employed in the *stipulatio* where *peregrini* were concerned. After a time the *stipulatio* lost its formal character and any words could be employed in question and answer which left no doubt as to the agreement of the parties, *i.e.* the question or the answer might be in

fide iubeo; facies? faciam. Sed haec quidem verborum obligatio, dari spondes? spondeo, propria civium Romanorum est; ceterae vero iuris gentium sunt, itaque inter omnes homines, sive cives Romanos sive peregrinos valent et quamvis ad Graecam vocem expressae fuerint, etiam hae tamen inter cives Romanos valent, si modo Graeci sermonis intellectum habeant.

Paul. 5, 7, 2

Verborum obligatio inter praesentes, non etiam inter absentes contrahitur. Quod si scriptum fuerit instrumento promisisse aliquem, perinde habetur, atque si interrogatione praecedente responsum sit.

Literal Contracts (*Litteris*)

Gai. 3, 128

Litteris obligatio fit veluti nominibus transcripticiis. Fit autem nomen transcripticium duplici modo, vel a re in personam vel a persona in personam. A re in personam transcriptio fit, veluti si id, quod

Greek or Latin, or the question in Greek and the answer in Latin, or the reverse. The *sponsio* and *stipulatio* are favorite ways of making engagements in Plautus, often for a humorous effect, *e.g. Curc.* 675; *Epid.* 8.

9. **Quod si scriptum fuerit instrumento**: it became customary for the purpose of proving an agreement which had been made orally to have a written instrument (*cautio*) drawn up in which the words of the spoken formula were inscribed. This instrument came to be evidence of the contract and was regarded as a presumption that the contract had been concluded *inter praesentes*. The *stipulatio* was a favorite mode of rendering informal agreements formal and actionable, and in transferring an obligation from one party to another.

12. **Litteris obligatio fit**: the obligation arising *litteris*, the so-called literal contract, grew out of the very ancient custom of bookkeeping at Rome. Every Roman citizen was expected to keep a careful and accurate record of his receipts and expenditures (*codex accepti et expensi*). This ancient ledger of the Romans was called *codex*. It

tu ex emptionis causa aut conductionis aut societatis mihi debeas, id expensum tibi tulero. A persona in personam transcriptio fit, veluti si id, quod mihi Titius debet, tibi id expensum tulero, id est si Titius te delegaverit mihi. Alia causa est eorum nominum, quae arcaria vocantur. In his enim rei, non litterarum obligatio consistit, quippe non

was originally a series of wax tablets joined together like a book slate. The *codex* was posted monthly, the items being transcribed from the day book (*adversaria*) and entered accurately under the proper heading as *accepta* or *expensa*. The *adversaria* might then be destroyed. Items so recorded were of great value as evidence of money transactions (debits and credits). According to Dionysius citizens swore to the accuracy of their ledgers before the censor. Out of this custom grew the literal contract. Instead of the mere record of the fact of receipts and disbursements, a legal relation arose by the *nomina transcripticia*. The record of an item in the *codex* of the creditor with the *consent* of the debtor, created a legal bond between debtor and creditor. It is immaterial whether a corresponding entry of the debt is made in the books of the debtor. The mere entry of the debt in the books of the creditor, under the proper conditions, produces the contract.

13 (p. 206). **Fit nomen transcripticium duplici modo**: the entry of the item (*nomen*, *i.e.* name of the debtor, then the *debt* itself) is made in the creditor's book with the consent of the debtor. The obligation may, however, be transformed (*nomen transcripticium*) in one of two ways (*duplici modo*): the *basis of the obligation* may be changed, *e.g.* when something is due on a contract of sale, the debtor may assent to his creditor's entering the debt on his books. The creditor can then enforce his claim on a contract *litteris* instead of a contract of sale (*emptionis causa*). This is called *transcriptio a re in personam*. There may also be effected in this way a *change of party* to the debt, as when one person assumed the debt of another. This was called *transcriptio a persona in personam*. It is said of the creditor '*expensum ferre*'; of the debtor '*acceptum ferre*,' when each party respectively made entry of the loan and its payment.

5. **quae arcaria vocantur**: *arcarium nomen* was the entry of the amount of money counted out (*pecunia numerata*) from the cash box (*arca*). It was, there-

aliter valent, quam si numerata sit pecunia. Numeratio autem pecuniae re facit obligationem; qua de causa recte dicemus, arcaria nomina nullam facere obligationem, sed obligationis factae testimonium praebere. Vnde non prorie dicitur, arcariis nominibus etiam peregrinos obligari, quia non ipso nomine, sed numeratione pecuniae obligantur; quod genus obligationis iuris gentium est. Transcripticiis vero nominibus an obligentur peregrini, merito quaeritur, quia quodammodo iuris civilis est talis obligatio; quod Nervae placuit. Sabino autem et Cassio visum est, si a re in personam fiat nomen transcripticium, etiam peregrinos obligari; si vero a persona in personam, non obligari.

Praeterea litterarum obligatio fieri videtur chirographis et syngraphis, id est, si quis debere se aut daturum se scribat; ita scilicet si eo nomine stipulatio non fiat: quod genus obligationis proprium peregrinorum est.

fore, the record of a genuine loan (*i.e.* the actual payment of money giving rise to a *rei obligatio*), not merely of an obligation arising from the fact of record in the ledger of the creditor (*litterarum obligatio*), i.e. *numeratio autem pecuniae rei facit obligationem*, but *arcaria nomina* are only evidence of an obligation arising from a real (*re*) contract. *Nomina arcaria* were converted into contracts *litteris* only by the intention of the parties that such a transformation shall be made.

5. arcariis nominibus peregrinos obligari: *arcaria nomina* bind *peregrini* because the contracts *re* were derived from the *ius gentium*, while the literal contract was an institution of the *ius civile* and applicable only to *cives Romani*. It is for this reason that the *nomen transcripticium a re in personam* was binding upon *peregrini*, not so, however, one *a persona in personam*.

13. obligatio fieri videtur chirographis: the literal contract disappeared before the time of Justinian, owing to the general decline in bookkeeping after citizenship was extended to the entire free population of the Roman world. Written contracts of Greek origin were the *chirographum* and *syngrapha* or promissory note, by which the debtor agrees to pay a

Consensual Contracts (*Consensu*)

Gai. 3, 135 Consensu fiunt obligationes in emptionibus venditionibus, locationibus conductionibus, societatibus, mandatis. Ideo autem istis modis consensu dicimus obligationes contrahi, quia neque verborum neque scripturae ulla proprietas desideratur, sed sufficit eos, qui negotium gerunt, consensisse; unde inter absentes quoque talia negotia contrahuntur, veluti per epistulam aut per internuntium, cum alioquin verborum obligatio inter absentes fieri non possit.

Sale (*Emptio Venditio*)

Paul. D. 18, 1, pr. Origo emendi vendendique a permutationibus coepit. Olim enim non ita erat nummus neque aliud merx, aliud pretium vocabatur, sed unusquisque secundum necessitatem temporum ac rerum utilibus inutilia per-

certain sum of money, the instrument being the evidence of the contract. The *chirographum* emanates from the debtor alone ('written with his own hand'), the *syngrapha* is a document bearing the seals of both creditor and debtor and is intrusted to a third person for safe-keeping.

Emptio Venditio: the contracts arising *consensu*, unlike those already considered, are rendered complete by the fact of consent alone. No specific form in which this consent is to be expressed is required. For this reason the consensual contracts are distinguished from all contracts requiring formalities (*e.g.* contracts *litteris*, *verbis*), and, as they are informal and arose from the common business requirements of all peoples, they are called contracts *iuris gentium*.

11. **Olim enim non ita erat nummus**: 'for in ancient times there was no coined money, nor was one thing called a commodity and the other a price.' *Permutatio* is the exchange of one commodity for another. *Emptio-venditio* is the exchange of a commodity for a money price. The jurists decided after a long controversy that *permutatio* and *emptio-venditio* are two distinct kinds of contract:

mutabat, quandò plerumque evenit, ut quod alteri superest alteri desit. Sed quia non semper nec facile concurrebat, ut, cum tu haberes quod ego desiderarem, invicem haberem quod tu accipere velles, electa materia est, cuius publica ac perpetua aestimatio difficultatibus permutationum aequalitate quantitatis subveniret. Eaque materia forma publica percussa usum dominiumque non tam ex substantia praebet quam ex quantitate, nec ultra merx utrumque, sed alterum pretium vocatur. Sed an sine nummis venditio dici hodieque possit, dubitatur, veluti si ego togam dedi, ut tunicam acciperem. Sabinus et Cassius esse emptionem et venditionem putant; Nerva et Proculus permutationem, non emptionem hoc esse. Sed verior est Nervae et Proculi sententia: nam ut aliud est vendere, aliud emere, alius emptor, alius venditor, sic aliud est pretium, aliud merx; quod in permutatione discerni non potest, uter emptor, uter venditor sit.

Gai. 3, 139

Emptio et venditio contrahitur, cum de pretio convenerit, quamvis nondum pretium numera-

the former is a contract *re*, arising from an exchange of *things* (*permutatio ex re tradita initium obligationi praebet*, D. 19, 4, 1, 2); the latter is a contract *consensu*, arising from an exchange of *promises* instead of things, whereby one party agrees to the future transfer of a thing (*merx*) after the payment by another of a money price (*pretium*). *Permutatio* or barter effects an alienation of property; *emptio-venditio* does not, unless followed by another act, *traditio*, required by Roman law to effect the alienation of the thing sold.

5. **aequalitate quantitatis**: 'removed the difficulty arising from barter because of the uniformity of values of coined money. The material, given its public character by coinage, confers the right of use and ownership not so much from its intrinsic value as from its value as a medium of exchange; and no longer are both things called commodities (*merx*), but one of them is now called price in money' (*pretium*).

18. **Emptio et venditio contra**

tum sit, ac ne arra quidem data fuerit; nam quod arrae nomine datur, argumentum est emptionis et venditionis contractae.

Paul. D. 18, 1, 34, 1

Omnium rerum, quas quis habere vel possidere vel persequi potest, venditio recte fit; quas vero natura vel gentium ius vel mores civitatis commercio exuerunt, earum nulla venditio est. Liberum hominem scientes emere non possumus. Sed nec talis emptio aut stipulatio admittenda est; 'cum servus erit,' quamvis dixerimus futuras res emi posse; nec enim fas est ciusmodi

hitur: the contract of purchase and sale is completed when the price has been agreed upon. An exchange of promises thereby arises between *emptor* and *venditor*, creating *iura in personam*; but to effect a change of ownership, a second act is necessary, namely, *traditio* (*delivery*), creating a *ius in rem*, after the price has been paid and the possession delivered. Security for the price, or credit without security, is sufficient to make the contract valid (*quod vendidi non aliter fit accipientis, quam si aut pretium nobis solutum sit aut satis eo nomine factum vel etiam fidem habuerimus emptori sine ulla satisfactione*, D. 18, 1, 19).

1. **ne arra quidem data fuerit**: *arra* (*arrha*, *arrabo*) was originally a ring given as a pledge or earnest for the payment of the price, to be returned when the price had been paid and the contract executed. The ring was not an essential part of the completion of the contract, but was merely proof of it (*argumentum*), and was especially retained in betrothal and marriage ceremonies (cf. note on *Betrothal*, p. 119). The party breaking off the match in *sponsalia* could be made to pay twice the amount of the *arra* given. The explanation in Harper's *Lat. Dict.* s. v. *arra*, from Isidor. *Orig.* 5, 25, that the *arra* was given as part of the purchase money is probably incorrect.

10. **futuras res emi posse**: anything which could be the subject of private ownership (*res in commercio*) could be sold. The sale of a freeman, wrongly supposed to be a slave, was invalid. The parties must be agreed on the *corpus* of the thing sold (*in corpore consensus*), *e.g.* the material of a commodity, the sex of a slave, though the actual contents of a thing otherwise definitely defined is immaterial. Hence there may be an *emptio rei futurae vel spe-*

casus exspectare. Item si et emptor et venditor scit furtivum esse quod venit, a neutra parte obligatio contrahitur; si emptor solus scit, non obligabitur venditor nec tamen ex vendito quicquam consequitur, nisi ultro quod convenerit praestet; quod si venditor scit, emptor ignoravit, utrimque obligatio contrahitur, et ita Pomponius quoque scribit.

Gai. 3, 140

Pretium autem certum esse debet: nam alioquin si ita inter nos convenerit, ut quanti Titius rem aestimaverit, tanti sit empta, Labeo negavit, ullam vim hoc negotium habere; cuius opinionem Cassius probat: Ofilius et eam emptionem et venditionem esse putat; cuius opinionem Proculus secutus est.

ratae, *i.e.* of the hope of uncertain profit, as so much each for as many fish as may be caught, the price being governed according to the amount of gain acquired; or there may be an *emptio spei*, *i.e.* the purchase of a thing hoped for, as so much for the chance of all the fish caught — though there may be no 'catch' at all, the price, however, to be absolutely paid (*aliquando tamen et sine re venditio intellegitur veluti cum quasi alea emitur. Quod fit, cum captum piscium vel avium vel missilium emitur: emptio enim contrahitur etiam si nihil inciderit, quia spei emptio est*, D. 18, 1, 8, 1).

7. **Pretium autem certum esse debet:** the price must be money (*pecunia numerata*), or, at least, partly in money, and definite (*certum*). If the determination of the price were left to a third party, Justinian decided that there was a sale if the party designated *named* the price, otherwise the sale was invalid (*sed nostra decisio ita hoc constituit, ut quotiens sic composita sit venditio 'quanti ille aestimaverit,' sub hac condicione staret contractus, ut, si quidem ipse qui nominatus est pretium definierit, omnimodo secundum eius aestimationem et pretium persolvatur et res tradatur, ut venditio ad effectum perducatur. Sin autem ille qui nominatus est vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem quasi nullo pretio statuto*, Inst. 3, 23, 1). A sale must be genuine (*verum*). If there were no intention to demand the price, the transaction is not sale but gift. The Romans, however, recognized sale for a merely nominal sum (*venditio nummo uno*) as valid in certain cases, *e.g.* sale *trans Tiberim* of deserters from the army. After

Inst. 3, 23, 3

Cum autem emptio et venditio contracta sit (quod effici diximus, simulatque de pretio convenerit, cum sine scriptura res agitur), periculum rei venditae statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque si homo mortuus sit vel aliqua parte corporis laesus fuerit, aut aedes totae aut aliqua ex parte incendio consumptae fuerint, aut fundus vi fluminis totus vel aliqua ex parte ablatus sit, sive etiam inundatione aquae aut arboribus turbine deiectis longe minor aut deterior esse coeperit, emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere. Quidquid enim sine dolo et culpa venditoris accidit, in eo venditor securus est. Sed et si post emptionem fundo ali-

Diocletian, sale for a price less than half the true value of the thing could be rescinded (*minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit*, C. 4, 44, 2).

3. **periculum rei venditae statim ad emptorem pertinet**: as soon as the parties have reached an agreement regarding the subject of sale and the price, all risk pertaining to the thing sold (*periculum rei*) and right to its profits (*commodum rei*) pass to the buyer (*commodum eius esse debet, cuius periculum est*), even though the thing purchased has not yet been delivered to him. This is true only if the thing sold is specific and the price definitely determined, but in the case of commodities sold by weight, measure, etc., since the sale is not complete until the weighing, measuring, etc., is performed, the risk is not assumed by the buyer. If, however, such things have been sold in mass (*per aversionem*, 'en bloc') they are at the buyer's risk.

12. **Quidquid sine dolo et culpa**: the buyer was bound to pay the price agreed upon, no matter what happened to the thing purchased. Until the payment of the price and the delivery of the thing, although the risk was the buyer's, the seller was bound to bestow the highest degree of diligence in preserving the thing in his custody. He was responsible not only for *dolus* and *culpa*, but he was also responsible for *culpa levis*, and was bound to bestow the care of a good and careful business man (*custodiam autem venditor talem praestare debet, quam praestant hi quibus res commodata est, ut diligentiam*

quid per alluvionem accessit, ad emptoris commodum pertinet; nam et commodum eius esse debet, cuius periculum est. Quod si fugerit homo qui veniit aut subreptus fuerit, ita ut neque dolus neque culpa venditoris interveniat, animadvertendum erit, an custodiam eius usque ad traditionem venditor susceperit. Sane enim, si susceperit, ad ipsius periculum is casus pertinet; si non susceperit, securus erit.

Ulp. D. 19, 1, 11, 2

Et in primis ipsam rem praestare venditorem oportet, id est tradere; quae res, si quidem dominus fuit venditor, facit et emptorem dominum, si non fuit, tantum evictionis nomine venditorem obligat, si modo pretium est numeratum aut eo nomine satisfactum.

Ulp. D. 21, 2, 1

Sive tota res evincatur sive pars, habet regressum emptor in venditorem.

Paul. 2, 17, 3

Res empta, mancipatione et traditione perfecta, si evincatur, auctoritatis venditor duplo tenus obligatur.

praestet exactiorem, quam in suis rebus adhiberet, D. 18, 6, 3); cf. note on *exactam* and on *quin*, p. 203. A slave, being possessed of reason, might succeed in making his escape notwithstanding the exercise of the degree of care expected of a *bonus paterfamilias*, but, in this case, the seller is not liable for the loss unless he has especially undertaken the custody of the slave in spite of any *casus* arising.

11. **tantum evictionis nomine**: the seller did not transfer ownership to the buyer, but possession or the right to enjoyment. He was bound to secure the buyer (*ut rem emptori habere liceat*) against *evictio*, *i.e.* removal by a third party who claimed a right of ownership in the whole thing, or a servitude or right of pledge in it; or removal by any one who had a better title to the thing than the seller.

16. **auctoritatis** (sc. *actione*) **venditor**: the seller as guarantor of title was called *auctor*. In case of the sale of a thing by *mancipatio*, the usual action (*auctoritatis actio*), in case of eviction, was for double the price agreed upon. Otherwise the buyer exacted from the seller a promise (*duplae stipulatio*) to pay double the price in case of eviction, in the absence of other agreement.

Ulp. D. 21, 2, 37

Emptori duplam promitti a venditore oportet, nisi aliud convenit.

Ulp. D. 21, 1, 1

Labeo scribit edictum aedilium curulium de venditionibus rerum esse tam earum quae soli sint quam earum quae mobiles aut se moventes. Aiunt aediles: qui mancipia vendunt, certiores faciant emptores, quid morbi vitiive cuique sit, quis fugitivus errove sit noxave solutus non sit; cademque omnia, cum ea mancipia venibunt, palam recte pronuntianto. Quodsi mancipium adversus ea venisset, sive adversus quod dictum promis-

3. **edictum aedilium curulium**: in the absence of wilful fraud (*dolus*) the *ius civile* had held to the principle of *caveat emptor*. In the case of slaves, however, owing to fraudulent sales arising from latent defects, the aediles required that the vendor be held liable for defect in the thing sold; and warranty of quality (though not of title) was also demanded by the aedilician edict. The buyer had the option of rescinding the sale, completely dissolving the contract (*actio redhibitoria*, a right of action enduring for six months); or, if the thing sold had secret faults, of compelling the seller to give compensation, or to reduce the price (*actio quanti minoris*, enduring for one year), whether the faults were not discoverable by the buyer or were unknown to him, regardless of the presence or absence of *dolus* on the part of the seller. The jurists extended the principle introduced by the aediles in the sale of slaves to the sale of all kinds of property. For the edict of the aedile, see Introd. 5.

6. **mancipia**: 'slaves'; **erro**, 'truant' or 'loiterer'; **fugitivus**, 'runaway,' having no intention of returning.

7. **quid morbi vitiive cuique sit**: what the defects were embraced by the terms *morbus vitiumve*, are set forth at length in the Digest (21, 1). The defects and infirmities admitting of rescission of the sale (*redhibitio*) under the edict were as a general rule physical ones. Faults of character did not vitiate the sale unless the vendor had distinctly denied them. Cf. above, *fugitivus errove*.

8. **noxave solutus non sit**: if the slave had not been cleared from the legal consequences of any theft or injuries which he had committed, he was liable to a noxal surrender (*noxae deditio*) *i.e.* the delivery of the slave to the injured party to atone for the wrong done.

sumve fuisset cum veniret, quod eius praestari oportere dicetur, emptori omnibusque ad quos ea res pertinet iudicium dabimus, ut id mancipium redhibeatur. Si quid autem post venditionem traditionemque deterius emptoris opera familiae procuratorisve eius factum erit, sive quid ex eo post venditionem natum adquisitum fuerit, et si quid aliud in venditione ei accesserit, sive quid ex ea re fructus pervenerit ad emptorem, ut ea omnia restituat. Item si quas accessiones ipse praestiterit, ut recipiat. Item si quod mancipium capitalem fraudem admiserit, mortis consciscendae sibi causa quid fecerit, inve harenam depugnandi causa ad bestias intromissus fuerit, ea omnia in venditione pronuntianto; ex his enim causis iudicium dabimus. Hoc amplius si quis adversus ea sciens dolo malo vendidisse dicetur, iudicium dabimus.

Ulp. D. 21, 1, 38

Aediles aiunt: qui iumenta vendunt, palam recte dicunto, quid in quoque eorum morbi vitiique sit, utique optime ornata vendendi causa fuerint, ita emptoribus tradentur. Si quid ita factum non erit, de

1. **quod eius praestari oportere**: after *eius* supply *causa*.

3. **ut id mancipium redhibeatur**: the aedile gave the buyer an action against the seller, requiring him to take back the thing sold and refund the purchase money (*redhibere est facere, ut rursus habeat venditor quod habuerit, et quia reddendo id fiebat, idcirco redhibitio est appellata quasi reditio*, D. 21, 1, 21).

8. **ut ea omnia restituat**: *i.e.* the buyer shall restore the thing in its original condition, if it has deteriorated while in his possession; and, if it has become enhanced in value, without the buyer's agency, the thing shall be restored with its increase.

16. **qui iumenta vendunt**: by *iumenta* the Romans mean generally horses, asses, and mules, but not oxen and other cattle (*boves magis 'armentorum' quam 'iumentorum' generis appellantur*, D. 50, 16, 89; *unde dubitari desiit, an hoc edicto boves quoque contineantur; etenim iumentorum appellatione non contineri eos verius est, sed pecoris appellatione continebuntur*, D. 21, 1, 38, 6).

ornamentis restituendis iumentisve ornamentorum nomine redhibendis in diebus sexaginta, morbi autem vitiive causa inemptis faciendis in sex mensibus, vel quo minoris cum venirent fuerint, in anno iudicium dabimus.

Ulp. D. 21, 1, 2

Causa huius edicti proponendi est, ut occurratur fallaciis vendentium et emptoribus sucurratur, quicumque decepti a venditoribus fuerint; dummodo sciamus venditorem, etiamsi ignoravit ea quae aediles praestari iubent, tamen teneri debere. Nec est hoc iniquum, potuit enim ea nota habere venditor; neque enim interest emptoris, cur fallatur, ignorantia venditoris an calliditate.

Hire (*Locatio Conductio*)

Inst. 3, 24, pr.

Locatio et conductio proxima est emptioni et venditioni isdemque iuris regulis consistunt. Nam ut emptio et venditio ita contrahitur, si de pretio convenerit, sic etiam locatio et conductio ita contrahi intellegitur, si merces constituta sit. Et competit locatori quidem locati actio, conductori vero conducti.

12. **Locatio et conductio**: the contract of letting and hiring is like that of buying and selling in that it is perfect as soon as the parties have agreed upon the object and the rent or wages (*merces*) to be paid. The *merces* is as essential to this contract as the *pretium* to the contract of sale. Of *locatio conductio* there are three varieties: *locatio conductio rei*, or a contract for the use of a thing in consideration of a money payment; *locatio conductio operarum*, or a letting of one's services in consideration of a money payment, *e.g.* service of employees, domestic servants, day laborers, etc. (*operae* meaning here 'unskilled labor,' *operae illiberales*); *locatio conductio operis* (gen. of *opus*), or a contract whereby one party agrees to supply another, in consideration of a money payment, with the product or result of labor or service (*operis faciendi*), *e.g.* manufacture, repairs, transportation of goods or passengers, etc.

Gai. 3, 145 Adeo autem emptio et venditio et locatio et conductio familiaritatem aliquam inter se habere videntur, ut in quibusdam causis quaeri soleat, utrum emptio et venditio contrahatur an locatio et conductio; veluti si qua res in perpetuum locata sit, quod evenit in praediis municipum, quae ea lege locantur, ut quamdiu id vectigal praestetur, neque ipsi conductori neque heredi eius praedium auferatur; sed magis placuit locationem conductionemque esse. Item quaeritur, si cum aurifice mihi convenerit, ut is ex auro suo certi ponderis certaeque formae anulos mihi faceret, et acciperet verbi gratia denarios CC, utrum emptio et venditio an locatio et conductio contrahatur. Cassius ait, materiae quidem emptionem venditionemque contrahi, operarum autem locationem et conductionem; sed plerisque placuit, emptionem et venditionem contrahi; atqui si meum aurum ei dedero, mercede pro opera constituta, convenit, locationem conductionem contrahi.

Inst. 3, 24, 5 Conductor omnia secundum legem conductionis facere debet et, si quid in lege praetermis-

5. **res in perpetuum locata sit**: 'as if property were leased in perpetuity, as happens in case of the lands of municipalities, which are leased on the condition that, as long as the rent shall be paid,' etc. — the reference is to *ager vectigalis*, or land leased by the *populus Romanus* or the *municipia*, for a fixed rental either in cash or produce. See note on *Fundus, Ager*, p. 161. The tribute paid by provincial land was called *vectigal*, *stipendium*, and *tributum*. *Praedia* owned by the *populus Romanus* were called *stipendiaria*; those owned by the emperor, *tributaria*. For the character of these long leases (*res in perpetuum locata*) in the time of Justinian, see *Class. Dict.* article *Emphyteusis*.

20. **si quid in lege praetermissum fuerit**: in the absence of special agreement to the contrary, the hirer is bound to do all that is fairly and reasonably expected of him. Cf. note on *exactam diligentiam*, p. 203.

sum fuerit, id ex bono et aequo debet praestare. Qui pro usu aut vestimentorum aut argenti aut iumenti mercedem aut dedit aut promisit, ab eo custodia talis desideratur, qualem diligentissimus pater familias suis rebus adhibet. Quam si praestiterit et aliquo casu rem amiserit, de restituenda ea non tenebitur. Mortuo conductore intra tempora conductionis heres eius eodem iure in conductionem succedit.

Ulp. D. 19, 2, 13, 11

Qui impleto tempore conductionis remansit in conductione, non solum reconduxisse videbitur, sed etiam pignora videntur durare obligata.

Quod autem diximus, taciturnitate utriusque partis colonum reconduxisse videri, ita accipiendum est, ut in ipso anno, quo tacuerunt, videantur eandem locationem renovasse, non etiam in sequentibus annis, etsi lustrum forte ab initio fuerat conductioni praestitutum. Sed et si secundo quoque anno post finitum lustrum nihil fuerit contrarium actum, eandem videri locationem in illo anno permansisse; hoc enim ipso, quo tacuerunt, consensisse videntur. Et hoc deinceps in unoquoque anno observan-

5. **aliquo casu rem amiserit**: the liability of the parties as regards risk arising from fortuitous loss (*casus*) is different in sale and hire. In the former contract, the risk (*periculum rei*) falls upon the buyer, in the latter upon the letter (*locator*), who, being the real owner of the thing, suffers the loss according to the usual rule '*res perit domino*.' But see, for sale, note on *periculum rei venditae*, p. 213.

12. **utriusque partis colonum**: *i.e.* by the silence of either party to the contract (*locator* or *conductor*). *Colonus* here means the lessee or tenant of rural land. The tenant of urban houses and land is called *inquilinus*. The usual Roman lease of land was for a term of five years (*lustrum*). *Colonus* in the meaning of the text should be distinguished from the *coloni* who composed a large part of the agricultural population of the later Roman empire. See *Class. Dict.* articles *Colonus* and *Colonatus*.

dum est. In urbanis autem praediis alio iure utimur, ut, prout quisque habitaverit, ita et obligetur, nisi in scriptis certum tempus conductioni comprehensum est.

Societas (*Partnership*)

Societatem coire solemus aut totorum bonorum, quam Graeci specialiter κοινοπραξίαν appellant, aut unius alicuius negotiationis, veluti mancipiorum emendorum vendendorumque, aut olei, vini, frumenti

Inst. 3, 25

Societas: *societas* is a contract whereby two or more persons agree to combine their property or labor for a common profit; or to acquire and hold property in common, sharing the profits and losses in like or unlike proportions. The essence of this contract is combination for the purpose of gain, and the contract is perfected by consent. The combination may be one of capital or of labor, or of both capital and labor. There can be no *societas* in which one party is entirely excluded from some share of the gain. Such an arrangement would partake more of the nature of a gift (*donationis causa societas recte non contrahitur*), and the jurists called it a *societas leonina*, since the favored partner received the lion's share (the name being derived from the lion of the fable, which deprived its weaker companions in the hunt of their share of the game). There are several varieties of partnership, according to the purpose and intent of the parties entering into this relation. They may combine all their possessions, present and subsequently acquired, including gifts, inheritances, legacies, etc., into a common stock (*societas universorum bonorum*); or a partnership may be formed to carry on a particular and continuous business, or it may embrace everything acquired by business transactions, though confined strictly to business matters (*universorum quae ex quaestu veniunt*), and hence not including gifts, inheritances, legacies, and the like (*societas negotiationis alicuius*). *Societas vectigalis*, mentioned in the text, is an example of this class, but it was unlike other business partnerships of this variety, in that it was governed by special rules, cf. D. 17, 2, 59. Or there may be a partnership for a particular, single transaction (*societas rei unius*), as for the management or sale of a piece of land, slave, etc. In the absence of well-expressed intentions to the con-

emendi vendendique. Et quidem si nihil de partibus lucri et damni nominatim convenerit, aequales scilicet partes et in lucro et in damno spectantur. Quod si expressae fuerint partes, hae servari debent; nec enim umquam dubium fuit, quin valeat conventio, si duo inter se pacti sunt, ut ad unum quidem duae partes et damni et lucri pertineant, ad alium tertia. De illa sane conventione quaesitum est, si Titius et Seius inter se pacti sunt, ut ad Titium lucri duae partes pertineant, damni tertia, ad Seium duae partes damni, lucri tertia, an rata debet haberi conventio? Quintus Mucius contra naturam societatis talem pactionem esse existimavit et ob id non esse ratam habendam. Servius Sulpicius, cuius sententia praevaluit, contra sentit, quia saepe quorundam ita pretiosa est opera in societate, ut eos iustum sit meliore condicione in societatem admitti: nam et ita coiri posse societatem non dubitatur, ut alter pecuniam conferat, alter non conferat et tamen lucrum inter eos commune sit, quia saepe opera alicuius pro pecunia valet. Et adeo contra Quinti Mucii sententiam obtinuit, ut illud quoque constiterit posse convenire, ut quis lucri partem ferat, damno non teneatur, quod et ipsum

trary, *societas* is presumed by law to relate to business matters and to the gains and losses ordinarily arising therefrom. Gain accruing, therefore, from private or family relations of a partner, such as gifts, inheritances, legacies, is ordinarily excluded from the terms of the contract of *societas*.

1. **Et quidem si nihil**: just as the contributions to the partnership may be of unequal shares, and of different kind and character, so the shares of gain and loss may be unequal (*societas autem coiri potest et valet etiam inter eos, qui non sunt aequis facultatibus, cum plerumque pauperior opera suppleat, quantum ei per comparationem patrimonii deest*, D. 17, 2, 5, 1). In the absence of special agreement, the partners share both gain and loss alike. If the proportion of gain is determined in the case of either partner, he suffers losses in the same proportion.

Servius convenienter sibi existimavit; quod tamen ita intellegi oportet, ut, si in aliqua re lucrum, in aliqua damnum allatum sit, compensatione facta solum quod superest intellegatur lucri esse. Illud expeditum est, si in una causa pars fuerit expressa, veluti in solo lucro vel in solo damno, in altera vero omissa, in eo quoque quod praetermissum est eandem partem servari. Manet autem societas eo usque, donec in eodem consensu perseveraverint; at cum aliquis renuntiaverit societati, solvitur societas. Sed plane si quis callide in hoc renuntiaverit societati, ut obveniens aliquod lucrum solus habeat, veluti si totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renuntiaverit societati, ut hereditatem solus lucrifaceret, cogitur hoc lucrum communicare; si quid vero aliud lucrifaceret, quod non captaverit, ad ipsum solum pertinet: ei vero, cui renuntiatum est, quidquid omnino post renuntiatam societatem adquiritur, soli conceditur. Solvitur adhuc societas etiam morte socii, quia qui societatem contrahit certam personam sibi eligit. Sed et si consensu plurium societas coita sit, morte unius socii solvitur, etsi

3. **compensatione facta**: although there might be a *societas* in which one partner shared in the gain but not in the loss, nevertheless this was understood to mean the net gain, after the balance had been struck between profit and loss in the various transactions (*compensatione facta solum quod superest lucri*).

9. **solvitur societas**: *societas* may be dissolved: by completion of the business (*finis negotio*); by expiration of the term agreed upon; by agreement (*dissensus*); by withdrawal of either party (*renuntiatio*), unless to defraud; by death (except in case of *societas vectigalis*); by *capitis deminutio*; by bankruptcy (*mole debiti praegravatus, cessio bonorum*); by confiscation (*publicatio*); by the *actio pro socio*.

15. **quod non captaverit**: 'which he has not sought to take with secret motive.'

20. **morte unius socii solvitur**: since the relation entered into by

plures supersint, nisi si in coeunda societate aliter convenerit. Item si alicuius rei contracta societas sit et finis negotio impositus est, finitur societas. Publicatione quoque distrahi societatem manifestum est, scilicet si universa bona socii publicentur; nam cum in eius locum alius succedit, pro mortuo habetur. Item si quis ex sociis mole debiti praegravatus bonis suis cesserit et ideo propter publica aut propter privata debita substantia eius veneat, solvitur societas. Sed hoc casu si adhuc consentiant in societatem, nova videtur incipere societas. Socius socio utrum eo nomine tantum teneatur pro socio actione, si quid dolo commiserit, sicut is qui deponi apud se passus

societas is purely personal, the death of any one of the several partners dissolves the partnership, unless otherwise agreed at the time of its formation.

5. **in eius locum alius succedit**: *publicatio* (*confiscatio*) is a confiscation (*publicare*, to make anything a *res publica*) or seizure of one's property by the *aerarium* or *fiscus*, which carried with it a *deminutio capitis* or civil death (*pro mortuo habetur*). In this case, the treasury of the state or fiscus became the partner's successor (*damnatione bona publicantur, cum aut vita adimitur aut civitas, aut servilis condicio irrogatur*, D. 48, 20, 1).

7. **bonis suis cesserit**: *cessio bonorum*, a debtor's voluntary surrender of his estate to his creditors, was an institution introduced by a *lex Iulia* (under Caesar or Augustus) rendering the ordinary debtor exempt from personal execution, infamy, and any degradation of status. The insolvent debtor, however, suffered from his insolvency in both political and private rights (*iura publica, iura privata*), the former being entirely lost, the latter being seriously affected (especially *ius commercii*). *Infamia*, or the loss of privileges and reputation (*existimatio*) usually caused by insolvency, might be averted by *cessio bonorum*.

11. **pro socio actione**: the rights and duties of partners, one with another, are enforced by the *actio pro socio*, which carries with it the *infamia* of the defaulting party. A *socius* is liable for *dolus* and for any loss arising from negligence due to a degree of diligence less than he is in the habit of bestow-

est, an etiam culpae, id est desidiae atque negligentiae nomine, quaesitum est; praevaluit tamen etiam culpae nomine teneri eum. Culpa autem non ad exactissimam diligentiam dirigenda est; sufficit enim talem diligentiam in communibus rebus adhibere socium, qualem suis rebus adhibere solet. Nam qui parum diligentem socium sibi adsumit, de se queri debet.

Ulp. D. 17, 2, 29, 2 Aristo refert Cassium respondisse societatem talem coiri non posse, ut alter lucrum tantum, alter damnum sentiret, et hanc societatem leoninam solitum appellare; et nos consentimus talem societatem nullam esse, ut alter lucrum sentiret, alter vero nullum lucrum, sed damnum sentiret; iniquissimum enim genus societatis est, ex qua quis damnum, non etiam lucrum spectet.

Ulp. D. 17, 2, 5 Societates contrahuntur sive universorum bonorum sive negotiationis alicuius sive vectigalis sive etiam rei unius.

Mandatvm

Paul. D. 17, 1, 1 Obligatio mandati consensu contrahentium consistit. Ideo per nuntium quoque vel per epistulam mandatum suscipi potest. Item sive 'rogo' sive 'volo' sive 'mando' sive alio quocumque verbo scripserit,

ing on his own business affairs (so-called *culpa levis in concreto*, see note on *exactam*, p. 203).

Mandatum: *mandatum* is a contract by which one person intrusts the performance of some commission or the management of some business to another, the latter, by his acceptance, binding himself to the proper execution of the undertaking without remuneration. The absence of pay or reward is essential to this contract, otherwise it became a *locatio conductio operarum*. The person giving the commission is called the mandator (*mandans*, sometimes *dominus*), the one by whom it is undertaken, the mandatee (*mandatarius*, sometimes *procurator*). The contract

mandati actio est. Item mandatum et in diem differri et sub condicione contrahi potest. Mandatum nisi gratuitum nullum est; nam originem ex officio atque amicitia trahit, contrarium ergo est officio merces; interveniente enim pecunia res ad locationem et conductionem potius respicit.

Ulp. D. 17, 1, 6, pr. Si remunerandi gratia honor intervenit, erit mandati actio.

Gai. D. 17, 1, 2 Mandatum inter nos contrahitur, sive mea tantum gratia tibi mandem sive aliena tantum sive mea et aliena sive mea et tua sive tua et aliena. Quod si tua tantum gratia tibi mandem, supervacuum est mandatum et

of *mandatum* may be entered into by expressing the consent orally, by letter, or by message; or it may be inferred from circumstances and the acts of the parties (*rebus ipsis et factis*). It may be made to take effect at a certain day (*in diem differri*) or it may be conditional (*sub condicione*).

3. **originem ex officio**: the representation of one person by another, agency or the legal relation of principal and agent, was only slightly recognized by Roman law. In all contracts, the person actually participating in making the agreement, whether by words or by any other formalities required by law, was the one bound. He contracted for himself and to him accrued the rights and duties growing out of the contractual relation. In the early law, the responsibility of entering into and executing a contract might be bestowed upon a trusted friend. The proper execution of this trust was then compelled not by law but by a sense of duty (*officium*) and friendship. The act or manner of making the promise was accompanied by due formalities and the commission was solemnly intrusted to the hand of another (*manu-datum*). For a good example of this formality see Plautus, *Capt.* 442–445: Tyn. *Haec per dexteram tuam*, etc. . . . Ph. *Mandasti satis*. Since *mandatum* grew out of a relation of mere friendship, it was necessarily gratuitous, and, although a present or *honorarium* (also *salarium*) might be given by way of friendship, or otherwise, *e.g.* to advocates, physicians, dentists, copyists, teachers, etc., it could not be made the subject of an action, except by an *extra ordinem* process (*extraordinaria cognitio*). Professors of law and philosophy could not maintain an action for recovery of fees, even

ob id nulla ex eo obligatio nascitur. Mea tantum gratia intervenit mandatum, veluti si tibi mandem, ut negotia mea geras vel ut fundum mihi emeres vel ut pro me fideiubeas. Aliena tantum, veluti si tibi mandem, ut Titii negotia gereres vel ut fundum ei emeres vel ut pro eo fideiubeas. Mea et aliena, veluti si tibi mandem, ut mea et Titii negotia gereres vel ut mihi et Titio fundum emeres vel ut pro me et Titio fideiubeas. Tua et mea, veluti si mandem tibi, ut sub usuris crederes ei, qui in rem meam mutuaretur. Tua et aliena, veluti si tibi mandem, ut Titio sub usuris crederes; quod si, ut sine usuris crederes aliena tantum gratia intervenit mandatum. Tua autem gratia intervenit mandatum, veluti si mandem tibi, ut pecunias tuas potius in emptiones praediorum colloces quam faeneres, vel ex diverso ut faeneres potius quam in emptiones praediorum colloces; cuius generis mandatum magis consilium est quam mandatum et ob id non est obligatorium, quia nemo ex consilio obligatur, etiamsi non expediat ei cui dabatur, quia liberum est cuique apud se explorare, an expediat sibi consilium.

extra ordinem. *Mandatum* never developed completely into the modern idea of principal and agent, whereby the acts of an agent bring his principal directly into binding legal relation with third parties. Representation was recognized in Roman law in the case of *servi in dominica potestate*, *filiifamilias in patria potestate*, and the praetor gave actions in the case of a shipmaster (*magister navis*) who could bind his employer (*exercitor*, *actio exercitoria*), and in case of a manager of a business or shop (*institor*, *actio institoria*) who could bind his employer.

3. **fideiubeas**: 'if you should bid it be done on your guaranty.' *Fideiubere* (*fideiussio*) was to enter into a contract by which a person bound himself as surety for another in any kind of an obligation (real, verbal, literal, consensual, civil, or natural). His liability was for the full amount, whether there were other *fideiussores* or not, and was inherited by his heir. Gai. 3, 119.

Gai. D. 17, 1, 27, 2 Qui mandatum suscepit, si potest id explere, deserere promissum officium non debet, alioquin quanti mandatoris intersit damnabitur; si vero intellegit explere se id officium non posse, id ipsum cum primum poterit debet mandatori nuntiare, ut is si velit alterius opera utatur; quod si, cum possit nuntiare, cessaverit, quanti mandatoris intersit tenebitur; si aliqua ex causa non poterit nuntiare, securus erit. Morte quoque eius cui mandatum est, si is integro adhuc mandato decesserit, solvitur mandatum et ob id heres eius, licet exsecutus fuerit mandatum, non habet mandati actionem. Impendia mandati exsequendi gratia facta si bona fide facta sunt, restitui omnimodo debent, nec ad rem pertinet, quod is qui mandasset potuisset, si ipse negotium gereret, minus impendere.

Paul. D. 13, 6, 17, 3 Voluntatis est enim suscipere mandatum, necessitatis consummare.

3. **quanti mandatoris intersit**: the mandatee is bound by his contract to compensate the mandator for '*quanti ea res est*,' or all damage which the latter has sustained as a consequence of the former's non-performance. This is called the creditor's '*interesse*.'

9. **solvitur mandatum**: a mandatum may be dissolved by death of either party; by recall on the part of the mandator, while the matter is untouched (*integra re*); by timely renunciation on the part of the mandatee, grounds being sufficient, which are said by Paulus, 2, 15, to be: *ob subitam valetudinem, ob necessariam peregrinationem, ob inimicitiam et inanes rei actiones integra adhuc causa mandati negotio renuntiari potest.*

10. **heres non habet mandati actionem**: since the obligation arising from the contract of *mandatum* is purely personal to the parties, it cannot be inherited. Furthermore, since in this case, *mandato integro*, the mandatee being dead, the obligation could not begin with an heir. *Mandatum* gives rise to two actions, *directa* and *contraria*. The mandator has an action against the mandatee (*actio mandati directa*) by which the latter's duty to due performance is secured. The mandatee has a counter action (*actio mandati contraria*) by which he sues for the

Obligations qvasi ex Contractv

Inst. 3, 27

Post genera contractuum enumerata dispiciamus etiam de his obligationibus, quae non proprie quidem ex contractu nasci intelleguntur, sed tamen, quia non ex maleficio substantiam capiunt, quasi ex contractu nasci videntur. Igitur cum quis absentis negotia gesserit, ultro citroque inter eos nascuntur actiones, quae appellantur negotiorum gestorum; sed domino quidem rei gestae adversus eum qui gessit directa competit actio, ne-

recovery of expenses incurred (*impendia mandati exsequendi*) and any loss to himself arising from the neglect of the mandator. Each of these actions branded the condemned party with *infamia*. Both parties must do all required by *bona fides* and must display *omnis diligentia*, being liable for *culpa levis* (*in abstracto*).

Obligations quasi ex Contractu: cf. note on *quasi*, p. 200. These are special obligations not classified under any of the four divisions of contracts already given. They are similar to contractual obligations, in that they may be enforced by legal actions. They do not, however, arise by agreement, but from facts or circumstances which bind two persons together by duties resembling those growing out of contract. They were, therefore, called by the jurists, *quasi ex contractu*. They have been well described as creating rights *in personam* without the consent of the persons bound. While rights *in personam* arising from consent are contracts, rights *in personam* arising from operation of law are quasi contracts (Hunter). They should not be confused with implied contracts (*actio in factum*, *praescriptis verbis*, 'action on the case').

5. negotia gesserit: *negotiorum gestio* is the voluntary and gratuitous undertaking of another's business, for the preservation of property and protection of another's interests during his absence. The obligation is similar to that arising from *mandatum*. It differs from *mandatum*, however, in that it is not a consensual contract, but arises from the fact of undertaking to serve the interests of another. The duties of the persons bound may be enforced by two actions (*ultro citroque*), the *actio negotiorum gestorum directa* and *contraria*. The former may be maintained by the *dominus negotii*

gotiorum autem gestori contraria. Quas ex nullo contractu proprie nasci manifestum est; quippe ita nascuntur istae actiones, si sine mandato quisque alienis negotiis gerendis se optulerit; ex qua causa ii quorum negotia gesta fuerint etiam ignorantes obligantur. Idque utilitatis causa receptum est, ne absentium, qui subita festinatione coacti nulli demandata negotiorum suorum administratione peregre profecti essent, desererentur negotia: quae sane nemo curaturus esset, si de eo quod quis impendisset nullam habiturus esset actionem. Sicut autem is qui utiliter gesserit negotia habet obligatum dominum negotiorum, ita et contra iste quoque tenetur, ut administrationis rationem reddat. Quo casu ad exactissimam quisque diligentiam compellitur reddere rationem; nec sufficit talem diligentiam adhibere, qualem suis rebus adhibere soleret, si modo alius diligentior commodius administraturus esset negotia.

(the absent proprietor) against the *negotiorum gestor*, or 'unauthorized agent' (*ut administrationis rationem reddat*), and the latter is a set-off or counter action by which the *negotiorum gestor* may enforce the obligation of the *dominus* to reimburse him for any necessary and useful outlay, on the condition, however, that the business has been properly conducted (*utiliter gestum*).

5. **ignorantes**: if the *dominus negotii* were aware that the business was being undertaken and did not interfere, the relation established would be a *mandatum tacitum*, rather than *negotiorum gestio*. The *gestor* must, however, undertake the business with the distinct intention of binding the *dominus* and not *animo donandi*.

13. **ad exactissimam quisque diligentiam compellitur**: the *negotiorum gestor*, although he is a volunteer, is liable not only for fraud (*dolus*) but generally also for any degree of fault (*culpa*), since, save for his interference, a more competent person might have undertaken the work. He must complete what he has undertaken (unless relieved), and must even bear the loss if he engage in any business not reasonably expected of him by his principal (*dominus*). He can sue his principal for all outlay caused by his

Tutores quoque, qui tutelae iudicio tenentur, non proprie ex contractu obligati intelleguntur (nullum enim negotium inter tutorem et pupillum contrahitur), sed quia sane non ex maleficio tenentur, quasi ex contractu teneri videntur. Et hoc autem casu mutuae sunt actiones: non tantum enim pupillus cum tutore habet tutelae actionem, sed et ex contrario tutor cum pupillo habet contrariam tutelae, si vel impenderit aliquid in rem pupilli vel pro eo fuerit obligatus aut rem suam creditori eius obligaverit. Item si inter aliquos communis sit res sine societate, veluti quod pariter

management, but only when the expenses were absolutely necessary and for the interest of the principal.

1. **qui tutelae iudicio tenentur**: the relation of guardian (*tutor* and *pupillus*) gave rise to duties on both sides, but as the relation did not arise by agreement (the office being required of the tutor as a public duty), but by law (*onus publicum*, cf. notes on *ius*, p. 139, and *Excusantur*, p. 143), the *tutelae administratio* was classified as a quasi contract.

5. **mutuae sunt actiones**: the actions are reciprocal, the ward having the *actio tutelae* against his guardian, the guardian, an *actio tutelae contraria* against his ward. By the former, the guardian's liability for fraud, fault, and negligent management (*diligentia quam suis rebus*) could be enforced. All the acts and omissions of the guardian's management were covered by this action. By the counter action (*actio tutelae contraria*), the guardian could compel the ward to reimburse him for any outlay honestly and judiciously made.

10. **communis res sine societate**: an obligation arises from the administration of joint property (*communio*, 'community of property') where there is no partnership, which, according to the nature of the case, may be enforced by different actions. Two or more persons sharing the same property (*res communis*) are liable to each other for its proper division by the *actio communi dividundo* (*quae inter eos redditur, inter quos aliquid commune est, ut id dividatur*, Inst. 4, 6, 20); those sharing the same inheritance, by the *actio familiae erciscundae*, i.e. *dividundae* (*haec actio proficiscitur e lege duodecim tabularum: namque coheredibus volentibus a communione discedere necessarium videbatur aliquam actionem constitui, qua inter eos res hereditа-*

eis legata donatave esset, et alter eorum alteri ideo teneatur communi dividundo iudicio, quod solus fructus ex ea re perceperit, aut quod socius eius in eam rem necessarias impensas fecerit, non intellegitur proprie ex contractu obligatus esse, quippe nihil inter se contraxerunt, sed quia non ex maleficio tenetur, quasi ex contractu teneri videtur.

Idem iuris est de eo, qui coheredi suo familiae erciscundae iudicio ex his causis obligatus est. Heres quoque legatorum nomine non proprie ex contractu obligatus intellegitur (neque enim cum herede neque cum defuncto ullum negotium legatarius gessisse proprie dici potest); et tamen, quia ex maleficio non est obligatus heres, quasi ex contractu debere intellegitur.

Item is, cui quis per errorem non debitum solvit, quasi ex contractu debere videtur. Adeo enim non intellegitur proprie ex contractu obligatus, ut, si certiorem rationem sequamur, magis ut supra diximus ex distractu, quam ex contractu possit dici obligatus esse; nam qui solvendi animo pecuniam dat, in hoc dare videtur, ut distrahat

riae distribuerentur, D. 10, 2, 1). An heir (*heres*) on acceptance of an inheritance (*aditio hereditatis*) is bound by a quasi contractual obligation to pay all valid legacies of the testator and to administer the estate in a proper manner.

14. **non debitum solvit**: the payment of something not due (*indebiti solutio*), *e.g.* a sum of money, or a legacy paid under a forged will, mistakenly supposed to be valid, could be recovered by an action called *condictio indebiti* (cf. also note on *mutui*, p. 201). This action lies only in case the payment made was due to an error in fact, and could not be maintained if the payment were due in equity or by a natural (*naturaliter*) obligation, *i.e.* an obligation having a moral or natural justification, though not legally enforceable. Since the obligation was founded on the *fact* that one party had been enriched at the expense of another, rather than on contract (*ex distractu quam ex contractu*), it was said to arise *quasi ex contractu*.

potius negotium quam contrahat. Sed tamen proinde is qui accepit obligatur, ac si mutuum illi daretur, et ideo condictione tenetur.

Obligations ex Delicto

Gai. 3, 182

Transeamus nunc ad obligationes, quae ex delicto nascuntur, veluti si quis furtum fecerit, bona rapuerit, damnum dederit, iniuriam commiserit; quarum omnium rerum uno genere consistit obligatio, cum ex contractu obligationes in quattuor genera diducantur, sicut supra exposuimus.

Obligations ex Delicto: the Romans theoretically regarded all obligations as arising from convention (*contractus*) or from wrongful acts (*delicta*) other than a breach of contract. It has been seen that contracts are of various kinds, according to the way in which they arise. Delicts are of one kind, *ex re*, *i.e.* all arise from the wrongful act itself (*ex delicto*). A delict is a violation of a person's right of property and of his rights of status, including liberty, reputation, health, honor, etc., *i.e.* rights which may be maintained against all mankind (*in rem*) and not merely against the person bound to the injured party by contractual obligation (*in personam*). *Delicta* are divided into two classes, public and private, or public and private wrongs. *Delicta publica* are crimes (*crimina*); *delicta privata* are torts or civil injuries. Not all wrongful acts are by the Roman law called delicts, but only those which are particularly characterized as such and for which the law provided special remedies by which a penalty or compensation could be enforced. Those mentioned in the text are: *furtum* (theft); *rapina* (robbery); *damnum iniuria* (damage to property); *iniuria* (injury to the person). It is important to notice that these wrongs (even theft and robbery) are here considered as private injuries (the wrongdoer being liable to the injured party, *delicta privata*, rather than to the state, *delicta publica*, *crimina*) and are enforceable by a private penalty. The actions arising from an obligation *ex delicto* are of a threefold character: they may be maintained (*a*) to compel the payment of a fine (*poena*, *actio poenalis*); (*b*) to make compensation for damages (*actio rei per-*

Theft (*Furtum*)

Inst. 4, 1, 1

Furtum est contrectatio rei fraudulosa vel ipsius rei vel etiam usus eius possessionisve, quod lege naturali prohibitum est admittere. Furtum autem vel a furvo id est nigro dictum est, quod clam et obscure fit et plerumque nocte; vel a fraude; vel a ferendo, id est aufe-

secutoria); (*c*) to compel the payment of both fine and damages at the same time (*actio mixta*).

Theft (Furtum): *furtum* is not identical with our word *theft*. The Romans included in the meaning of this delict what we call theft, embezzlement, and conversion. The term *furtum* is, therefore, more comprehensive, embracing acts which do not constitute a theft, as, for example, the *furtum* of one's own thing or a *furtum* with the intention of returning the object taken. See below, *furtum possessionis*, *furtum usus*. *Contrectatio rei* is an actual dealing with a thing by physical touch, accompanied by an evil intent (*fraudulosa*). An intent is not sufficient to constitute a *furtum*, since the delict must be one which can be estimated and the injury repaired (*furtum sine dolo malo non committitur*). The praetor (later republican period) came to distinguish secret and forcible taking (*rapina*, *vi bona rapta*, cf. below, *rapina*) from the old *ius civile* conception of *furtum* as *any* wilfully wrong appropriation of property. The *contrectatio* may be (*a*) *ipsius rei*, *i.e.* the taking of another's movable property, either by removing it from his detention or by a wrongful appropriation of a *commodatum*, *depositum*, etc.; (*b*) *usus*, *i.e.* the temporary use of a *depositum* or pledge, or the use of a *commodatum* otherwise than was intended by the owner (*commodator*); (*c*) *possessionis*, *i.e.* when the owner removes his own thing from the *bona fide* possession of another (as a pledge from the hands of a creditor), the owner himself thereby becoming guilty of *furtum*. In all these cases, the same actions may be brought. Not only movable things may be the subject of theft, but also free persons might be stolen, as a wife *in manu*, a child *in potestate*, and a judgment debtor (*addictus*, *iudicatus*). Aid and advice given to a thief render the giver liable for theft (*furtum nec manifestum* only), if the wrongful act be actually perpetrated (*opē consilio alicuius furtum factum*).

3. **Furtum a furvo**: *furtum*, derived from *fur*, from the root *fer*

rendo; vel a Graeco sermone, qui φῶρας appellant fures. Immo etiam Graeci ἀπὸ τοῦ φέρειν φῶρας dixerunt. Furtorum autem genera duo sunt, manifestum et nec manifestum. Nam conceptum et oblatum species potius actionis sunt furto cohaerentes quam genera furtorum, sicut inferius apparebit. Manifestus fur est, quem Graeci ἐπ' αὐτοφώρῳ appellant; nec solum is qui in ipso furto deprehenditur, sed etiam is qui eo loco deprehenditur, quo fit, veluti qui in domo furtum fecit et nondum egressus ianuam depre-

(*ferre*), means both the 'act of carrying off' and the 'thing carried off' in an unlawful manner. In strict technical language it means the wrongful appropriation of *private* property as distinguished from *sacrilegium*, appropriation of the property of the gods, and *peculatus* (sometimes called *furtum publicum* or *furtum pecuniae publicae*), the appropriation of public property.

3. **nec manifestum**: for *nec* = *non* in formulae and legal phraseology, see Harper's *Lat. Dict.* s.v. *neque*, I, and cf. note on *res*, p. 163. Cf. Festus, s.v. *nec*. As early as the Twelve Tables there was a distinction between *furtum manifestum* and *nec manifestum* (*manu-fendere*, 'to strike or grasp with the hand'). *Fur manifestus* is a thief caught with the stolen object in his possession (*qui deprehenditur cum furto*). *Furtum manifestum* was variously defined by the Roman jurists as (*a*) when the thief is not merely seen but caught in the act of thieving; (*b*) when the thief is caught on the spot where the act was perpetrated; (*c*) when the thief is seen or caught before he brought the stolen object to the destination intended; (*d*) when the thief was merely seen anywhere with the stolen object in his possession. The opinion of the text is that under (*c*). The Twelve Tables allowed the killing of a thief surprised in the night and of thieves defending themselves with weapons, cf. text, p. 245. Otherwise, the penalty for *furtum manifestum*, where the thief was a slave, was death; where he was a freeman, surrender into slavery (or bond service) to the injured person. For *furtum nec manifestum* the penalty was twice the value of the thing stolen, regardless of the status of the thief. The praetor altered the penalty for *furtum manifestum* to four times the value of the thing stolen and retained the penalty for *furtum nec manifestum* (see text below).

hensus fuerit, et qui in oliveto olivarum aut in vineto uvarum furtum fecit, quamdiu in eo oliveto aut in vineto fur deprehensus sit; immo ulterius furtum manifestum extendendum est, quamdiu eam rem fur tenens visus vel deprehensus fuerit sive in publico sive in privato vel a domino vel ab alio, antequam eo pervenerit, quo perferre ac deponere rem destinasset. Sed si pertulit quo destinavit, tametsi deprehendatur cum re furtiva, non est manifestus fur. Nec manifestum furtum quid sit, ex his quae diximus intellegitur; nam quod manifestum non est, id scilicet nec manifestum est. Conceptum furtum dicitur, cum apud aliquem testibus praesentibus furtiva res quaesita et inventa sit; nam in eum propria actio constituta est, quamvis fur non sit, quae appellatur concepti. Oblatum furtum dicitur, cum res furtiva ab aliquo tibi oblata sit eaque apud te concepta sit, utique si ea mente tibi data fuerit, ut apud

11. **Conceptum furtum dicitur**: the text mentions several actions connected with theft, belonging to the earlier law and arising from the right of private search, which had become obsolete in the time of Justinian (see below). Of these four, *concepti*, *oblati*, *prohibiti*, and *non exhibiti*, the first three are mentioned by Gaius and Paulus as still in use. *Furtum conceptum* was receiving a stolen thing so that it was found, in the presence of witnesses and after a formal search (described below), in the possession of a person. *Furtum oblatum* was when a stolen thing was transferred (*oblatum*) to another than the thief, in order that it might be found with him and was so found. In each of these cases the action against the guilty party was for three times the value of the thing stolen. *Furtum prohibitum* was when the search for a stolen object was hindered. The one causing the hindrance was liable for four times the value of the stolen thing. *Furtum non exhibitum* was when a stolen thing was not handed over by one who actually had it in his possession. "The expressions *furtum conceptum*, *oblatum*, etc., are examples of the participle used to denote not the thing or person acted on, but the action itself." Roby, *Lat. Gr.* § 1410.

te potius quam apud eum qui dederit conciperetur; nam tibi, apud quem concepta sit, propria adversus eum qui optulit, quamvis fur non sit, constituta est actio, quae appellatur oblati. Est etiam prohibiti furti actio adversus eum, qui furtum quaerere testibus praesentibus volentem prohibuerit. Praeterea poena constituitur edicto praetoris per actionem furti non exhibiti adversus eum, qui furtivam rem apud se quaesitam et inventam non exhibuit. Sed hae actiones id est concepti et oblati et furti prohibiti nec non furti non exhibiti, in desuetudinem abierunt. Cum enim requisitio rei furtivae hodie secundum veterem observationem non fit; merito ex consequentia etiam praefatae actiones ab usu communi recesserunt, cum manifestissimum est, quod omnes, qui scientes rem furtivam susceperint et celaverint, furti nec manifesti obnoxii sunt. Poena manifesti furti quadrupli est tam ex servi persona quam ex liberi, nec manifesti dupli.

Gai. 3, 189

Poena manifesti furti ex lege XII tabularum capitalis erat. Nam liber verberatus addicebatur ei cui furtum fecerat; utrum autem servus efficeretur ex

15. **Poena manifesti furti quadrupli**: it would seem to us that the penalties should be reversed in the two kinds of theft. But the Roman principle appears in other primitive systems and has been variously explained. Perhaps the best view is that the heavier penalty of *furtum manifestum* was a concession to the sudden wrath and desire for vengeance on the part of the injured person, and was designed to induce him to refrain from self-redress, such as he was allowed to exercise toward a nocturnal thief. To prevent the infliction of summary vengeance and to induce the injured party to have recourse to public process rather than to seek a private remedy, the primitive law of the Twelve Tables allowed him more satisfying penal damages than in the case of *furtum nec manifestum*. The *poena quadrupli* was a bonus in favor of peace as against private violence. Both the *poena quadrupli* and *dupli* were pure penalty. The

addictione, an adiudicati loco constitueretur, veteres quaerebant. In servum aeque verberatum animadvertebatur. Sed postea inprobata est asperitas poenae et tam ex servi persona quam ex liberi quadrupli actio praetoris edicto constituta est. Nec manifesti furti poena per legem XII

owner could sue for the thing or its value by real or personal action (*vindicatio* or *condictio;* see note on *quadruplatur*, p. 242). — **capitalis erat**: it should not be forgotten that *capitalis* means 'pertaining to *caput*' as a condition of status or the civil position of an individual with reference to liberty, citizenship, and family relations (cf. note on *Capitis*, p. 136) and that a *poena capitalis* does not necessarily involve 'capital' punishment (*rei capitalis damnatum sic accipere debemus, ex qua causa damnato vel mors vel etiam civitatis amissio vel servitus contingit*). The Twelve Tables prescribed a twofold punishment for the *fur manifestus*, of which the more severe only was *capitalis*. If he were a slave, he received the death penalty, being thrown from the Tarpeian rock after flagellation (*servos furti manifesti prensos verberibus affici et e saxo praecipitari*, Gell. 11, 18, 8). If the thief were a freeman, the penalty was addiction (*addictio*), the guilty person being beaten and delivered as a bondman to the one injured by the theft. The ancient jurists were in doubt whether a freeman was reduced thereby to actual slavery (*servus ex addictione*), or merely to the condition of a judgment debtor (*adiudicati loco, in causa mancipii*, cf. also note on *aliae*, p. 128) delivered up to his creditor. This latter condition, however, did not take away citizenship and merely suspended personal freedom temporarily. The opinion prevailed that the penalty was actual slavery and it was accordingly *poena capitalis* (*civitatis amissio, servitus contingit*). The penalty in both cases was, therefore, *capitalis*. But the penalty for *furtum* as a delict differed from that for *furtum* as a crime in that the former admitted of settlement (*pecuniaria aestimatio*) by agreement between the thief and the injured person (*de furto pacisci lex*, i.e. *XII tabularum, permittit*, D. 2, 14, 7, 14). In this case the penalty was not *capitalis*, but the right of action was extinguished by composition (*quaedam actiones per pactum ipso iure tolluntur, ut furti*, D. 2, 14, 17, 1). The praetor mollified the law by requiring pecuniary damages in all cases (*pro capitali poena pecuniaria constituta*). It may be asked how a penalty for fourfold or twofold damages could

tabularum dupli inrogatur, eamque etiam praetor conservat. Concepti et oblati poena ex lege XII tabularum tripli est, eaque similiter a praetore servatur. Prohibiti actio quadrupli est ex edicto praetoris introducta; lex autem eo nomine nullam poenam constituit. Hoc solum praecipit, ut qui quaerere velit, nudus quaerat, licio cinctus, lancem habens; qui si quid invenerit, iubet id lex furtum manifestum esse. Quid sit autem licium, quaesitum est. Sed verius est consuti genus esse, quo necessariae partes tegerentur. Quae res ridicula est. Nam qui vestitum quaerere prohibet, is et nudum quaerere prohibiturus est, eo

be enforced against a thief, if judgment were given against him. Execution was taken against the thief just as against any other debtor. Inability to pay, therefore, resulted in his imprisonment as a judgment debtor (*fur addictus*) and reduction to slavery (*fures privatorum furtorum in nervo atque compedibus aetatem agunt*, Gell. 11, 18, 18).

6. **nudus quaerat, licio cinctus**: peculiar to the delict of theft is the right of private search for the discovery of stolen property, by the ancient form here described. The Twelve Tables contained provisions for the method of procedure. The person instituting the search must, in advance, name and describe the object of his search (*qui furtum quaesiturus est, antequam quaerat, debet dicere quid quaerat et rem suo nomine et sua specie designare*). Ancients and moderns have expressed various opinions regarding the meaning and significance of the terms employed in this description of the *quaestio concepti furti per licium et lancem*. For a full discussion, see Karlowa, *Römische Rechtsgeschichte*, Band II, p. 777. *Licium* means girdle and was probably prescribed to prevent the possibility of smuggling stolen goods into the house searched, or of carrying away objects secretly taken during the search. The *lanx* possibly typified the open and lawful removal of the stolen object, if found. This formal search, taking the form *licio et lance* at Rome, is a primitive institution found also among several other peoples, *e.g.* Greeks, Germans, Slavs, Kelts. In the time of Justinian, the search for stolen property was not carried on by private persons, but by public officers as in modern times.

10. **Quae res**: i.e. *tota lex*.

magis quod ita quaesita re et inventa maiori poenae subiciatur. Deinde quod lancem sive ideo haberi iubeat, ut manibus occupatis nihil subiciat, sive ideo, ut quod invenerit ibi inponat, neutrum eorum procedit, si id quod quaeratur, eius magnitudinis aut naturae sit, ut neque subici neque ibi inponi possit. Certe non dubitatur, cuiuscumque materiae sit ea lanx, satis legi fieri.

Robbery (*Rapina*)

Ulp. D. 47, 8, 2

Praetor ait: 'Si cui dolo malo hominibus coactis damni quid factum esse dicetur sive cuius bona rapta esse dicentur, in eum, qui id fecisse dicetur, iudicium dabo. Item si servus fecisse dicetur, in dominum

Rapina: *rapina*, as a delict, was first formulated and defined by the praetorian edict. The praetor, M. Licinius Lucullus, granted an action designed to suppress the forcible seizure of property and general lawlessness which became prevalent during the civil war in the time of Sulla. This action furnishes a good example of the way in which the praetorian edict affected the development of the law (cf. Introd. 5). Originally *furtum* included every wrongful appropriation of another's property, whether done openly or by stealth. The special action of the praetor applied only to seizure with open force (*vi bona rapta*), while *furtum* came to be restricted to the secret taking of property. By the *ius civile*, the violent taking of property would be merely *furtum nec manifestum*, with a twofold penalty, while by the edict it received the severer penalty equivalent to fourfold the value of the property plundered (but see below, note on *quadruplatur*, p. 242).

8. **dolo malo**: *rapina* does not differ from *furtum* in regard to *dolus* or the evil intent, for both required its presence; but in the edict, *dolo malo* implied the use of force (see below, '*dolus habet in se et vim*'). Just as in *furtum*, no offense was committed without the intent to steal (*animus furandi*), so in *rapina*, where there was a forcible taking under color of right, no offense was committed, *e.g.* a taxgatherer who drove off the cattle of one erroneously presumed to have broken the revenue laws (*lex vectigalis*) was not liable under the edict. — **hominibus**

iudicium noxale dabo.' Hoc edicto contra ea, quae vi committuntur, consuluit praetor. Nam si quis se vim passum docere possit, publico iudicio de vi potest experiri, neque debet publico iudicio privata actione praeiudicari quidam putant; sed utilius visum est, quamvis praeiudicium legi Iuliae de vi privata fiat, nihilo minus tamen non esse denegandam actionem eligentibus privatam persecutionem. 'Dolo' autem 'malo facere' potest (quod edictum ait) non

coactis: it was sufficient under the edict that men be collected or instigated to collect in a riotous manner, whether armed or not. They might be numerous; even a single person sufficed, whether free or slave. The original edict ran 'si cui *vi* dolo malo hominibus coactis *armatisve*,' etc., the principal idea contained in it being *vi*, force, and the instigation of others to the use of force. *Bona rapta* was held to mean even the least thing carried off by force.

1. **iudicium noxale dabo**: *iudicium* here (as often) is equivalent to *actio*. When a slave committed a delict, his master became liable for the wrong done and had the option of paying the penalties and damages, or else he might surrender the slave to the injured party (*noxae dedere*, 'to give up to the harm,' *i.e.* to surrender to the one harmed), *aut noxam sarcire aut noxae dedere*. Such actions might arise by law or by praetorian edict. The Twelve Tables gave a noxal action for *furtum*; the praetor, for *rapina*. Gaius explains that it was unjust that a master should suffer loss for the delicts of his slaves greater than the value of each slave's person (*erat enim iniquum nequitiam eorum, ultra ipsorum corpora, parentibus dominisve damnosam esse*, Gai. 4, 75. The noxal surrender applied to *filiifamilias* also, in the older law (abolished by Justinian).

5. **legi Iuliae de vi**: the party, whose goods were plundered, might proceed by civil action, or by a criminal prosecution under the *lex Iulia de vi publica et privata*. This law, enacted by Julius Caesar or Augustus, punished violence with armed force (*vis publica*) by deportation, violence without arms (*vis privata*) by confiscation of one third of the criminal's goods.

6. **non esse denegandam actionem**: *i.e.* the aggrieved party must choose which course he will pursue; the right to proceed criminally ought not to be prejudiced by the bringing of a civil action, as some think; but even though the right to prosecute under the *lex Iulia de vi*

tantum is qui rapit, sed et qui praecedente consilio ad hoc ipsum homines colligit armatos, ut damnum det bonave rapiat. Sive igitur ipse quis cogat homines sive ab alio coactis utitur ad rapiendum, dolo malo facere videtur. Homines coactos accipere debemus ad hoc coactos, ut damnum daretur. Neque additur, quales homines: qualescumque sive liberos sive servos.

Doli mali mentio hic et vim in se habet. Nam qui vim facit, dolo malo fecit, non tamen qui dolo malo facit, utique et vi facit. Ita dolus habet in se et vim, et sine vi si quid callide admissum est, aeque continebitur. 'Damni' praetor inquit; omnia ergo damna continet et clandestina. Sed non puto clandestina, sed ea, quae violentia permixta sunt. Etiam quis recte definiet, si quid solus admiserit quis non vi, non contineri hoc edicto, et si quid hominibus coactis, etiamsi sine vi, dummodo dolo sit admissum, ad hoc edictum spectare.

'Vel cuius bona rapta esse dicuntur.' Quod ait praetor 'bona rapta,' sic accipiemus: etiam si una res ex bonis rapta sit.

In hac actione intra annum utilem verum pretium rei

privata was prejudiced, nevertheless it seemed more expedient that an action should not be denied those preferring a private remedy.

12. **clandestina**: the word is probably a gloss, as the idea of open force is the principal ground for the praetor's action, while concealed or clandestine removal of goods was *furtum*.

21. **intra annum utilem**: an *annus utilis*, as a period of time fixed by the praetor, was a judicial year, *i.e.* a period of three hundred and sixty-five days actually available (*utilis*, 'usable') for beginning legal proceedings. In reckoning the days of such a period of time (*tempus utile*), only those days were counted on which the plaintiff was not hindered from beginning proceedings. Those days were, therefore, excluded on which the courts did not sit, or during which the plaintiff was ignorant of his right, or the intended defendant

quadruplatur, non etiam quod interest. Haec actio etiam familiae nomine competit, non imposita necessitate ostendendi, qui sunt ex familia homines qui rapuerunt vel etiam damnum dederunt. Familiae autem appellatio servos continet, hoc est eos, qui in ministerio sunt, etiamsi liberi esse proponantur vel alieni bona fide nobis servientes.

Ex hac actione noxae deditio non totius familiae, sed eorum tantum vel eius, qui dolo fecisse comperietur, fieri debet. Haec actio volgo vi bonorum raptorum dicitur.

Damage to Property (*Damnum Iniuria Datum*)

Ulp. D. 9, 2, 1

Lex Aquilia omnibus legibus, quae ante se de damno iniuria locutae sunt, derogavit, sive duodecim tabulis, sive alia quae fuit; quas leges nunc referre

was unknown. The *annus utilis* was, therefore, more than twelve months. When every day was counted, the time was called *tempus continuum*.

1. **quadruplatur**: the *quadruplum* claimed by the plaintiff by the *actio vi bonorum raptorum* included the restoration of the property, or its value, as damages *in simplum*, and three times the value of the property plundered as a penalty, *i.e.* a *triplum* as penal damages. The action was, therefore, an *actio mixta* (see note on *Obligations*, p. 232, end). Cf. the *actio furti manifesti* where the *quadruplum* is a penalty, the thing when not destroyed, otherwise its value, being recoverable in addition by a *vindicatio rei* or a *condictio furtiva*, respectively.

Damage to Property: the ancient law of the Twelve Tables and later statutes providing for the punishment of injury to private property was largely supplanted by the *lex Aquilia*, a *plebiscitum* proposed by a certain Aquilius, tribune of the plebs. The date of this statute is uncertain. It is said to have been enacted after a secession of the plebs, as a further safeguard against the oppression of the patricians. However that may be, it undoubtedly dates from a time when slaves and herds were the chief wealth of the Romans, and when agriculture and stock-raising formed their chief occupations. Uncoined money (*aes grave*) was still employed as a standard of value in imposing fines (*aes dare damnas esto*). The *lex*

non est necesse. Quae lex Aquilia plebiscitum est, cum eam Aquilius tribunus plebis a plebe rogaverit.

Gai. D. 9, 2, 2

Lege Aquilia capite primo cavetur: 'ut qui servum servamve alienum alienamve quadrupedem vel pecudem iniuria occiderit, quanti id in eo anno

Aquilia was probably one of the earliest *plebiscita* enacted under the *lex Hortensia*, 287 B.C. (*i.e.* soon after the third secession of the plebs), by the terms of which *plebiscita* were put on an equal footing with *leges* and were binding on the whole people (cf. Introd. 2 and note on *plebiscita*, p. 50). The Aquilian law provided for the punishment of damage to property, resulting either in the total loss of a definite corporeal thing, or in an injury to it which could be estimated in money. It was composed of three chapters. The first granted an action for the wrongful killing of another's slave or fourfooted domestic animal (except dogs), *i.e.* horse, ass, mule, goat, sheep, pig. The jurists included within the meaning of the statute elephants and camels as beasts of burden. This chapter of the law embraced a wider range of animals, therefore, than the older distinction of *res mancipi* and *res nec mancipi*, cf. note on *res*, p. 163. The second chapter (obsolete in the time of Justinian) was concerned with a very different kind of injury, and its connection with the rest of the statute is not clear. It granted an action (for the amount of the loss sustained) against an *adstipulator* (an accessory creditor) who released the debtor from payment in such a way as to defraud a *stipulator* (an original and principal creditor), Gai. 3, 215. The third chapter made provision for the wrongful (*a*) wounding of slaves and animals named in Chap. i; (*b*) killing or wounding any other kinds of animals, or damaging any other kinds of corporeal property belonging to another.

3. **ut qui**: *si quis* should probably be read. What purports here to be the text of the law was, of course, originally in much more archaic Latin.

5. **iniuria**: for *iniuria* in the specific sense, as a distinct delict, meaning *insult*, *insulting conduct*, see text below, p. 250. In this statute, *iniuria* means 'without right, wrongfully' (*in-ius; quod non iure factum est*). The *lex Aquilia* applied only to culpable damage (*i.e.* where there was even the slightest degree of *culpa*) and was not restricted to wilful or malicious injury (*damnum culpa datum etiam ab eo qui nocēre noluit*). It did not apply to hurt done in self-defense (*vim vi de-*

plurimi fuit, tantum aes dare domino damnas esto'; et infra deinde cavetur, ut adversus infitiantem in duplum actio esset. Vt igitur apparet, servis nostris exaequat quadrupedes, quae pecudum numero sunt et gregatim habentur, veluti oves caprae boves equi muli asini. Sed an sues pecudum appellatione continentur, quaeritur; et recte Labeoni placet contineri. Sed canis inter pecudes non est. Longe magis bestiae in eo numero non sunt, veluti ursi, leones, pantherae. Elefanti autem et cameli quasi mixti sunt (nam et iumentorum operam praestant et natura eorum fera est) et ideo primo capite contineri eas oportet.

fendere omnes leges omniaque iura permittunt). No reparation is required where damage is caused by one who exercises his own right (*non videtur vim facere qui iure suo utitur*) or by unavoidable accident in the absence of all blame. — **id**: i.e. *ea res*, as in the third chapter below. — **in eo anno plurimi**: the action was for the highest value which the damaged property had attained at any time during the year previous to the injury (*i.e.* death or time when fatal wound was received), not the mere value of the thing at time of loss (*verum rei pretium*). As the plaintiff's full interest (*interesse*) was covered, it was an *actio mixta*, combining both indemnity and penalty (cf. note on *Obligations*, p. 232). No account was taken, however, of purely personal feelings and sentiments, having no economic value (*non affectiones aestimandas esse puto*), *e.g.* family affection. But in estimating the value of a slave, his talents and accomplishments were taken into account.

1. **damnas**: *condemned*. This indeclinable adjective or participial form is common in legal formulae. *Damnas esto* means that the defendant stands already condemned; if he attempt to evade the judgment against him by denying his guilt (*infitiantem*) and standing trial, an action for twice the estimated damage will lie against him (if shown to be guilty) because of his non-admission; whereas the offender admitting his guilt (*confessus*) has the simple value to pay, as estimated by the judge (*notandum, quod in hac actione, quae adversus confitentem datur, iudex non rei iudicandae sed aestimandae datur, nam nullae partes sunt iudicandi in confitentes*, D. 9, 2, 25).

11. **eas**: i.e. *bestias*.

Itaque si servum tuum latronem insidiantem mihi occidero, securus ero; nam adversus periculum naturalis ratio permittit se defendere. Lex XII tabularum furem noctu deprehensum occidere permittit, ut tamen id ipsum cum clamore testificetur; interdiu autem deprehensum ita permittit occidere, si is se telo defendat, ut tamen aeque cum clamore testificetur.

Ulp. D. 9, 2, 5

Sed et si quemcumque alium ferro se petentem quis occiderit, non videbitur iniuria occidisse: et si metu quis mortis furem occiderit, non dubitabitur, quin lege Aquilia non teneatur. Sin autem cum posset adprehendere, maluit occidere, magis est ut iniuria fecisse videatur: ergo et Cornelia tenebitur. Iniuriam autem hic accipere nos oportet non quemadmodum circa iniuriarum actionem contumeliam quandam, sed quod non iure factum est, hoc est contra ius, id est si culpa quis occiderit; et ideo interdum utraque actio concurrit et legis Aquiliae et iniuriarum, sed duae erunt aestimationes, alia damni alia contumeliae. Igitur iniuriam hic damnum accipiemus culpa datum etiam ab eo, qui nocere noluit. Et ideo quaerimus, si furiosus damnum dederit, an legis Aquiliae actio sit; et Pegasus negavit: quae enim in eo culpa sit,

13. **Cornelia** (sc. *lege*) **tenebitur**: before the *lex Cornelia*, enacted by Sulla, the killing of another's slave was punished simply as damage to property, but by that law it was also made a crime, punishable by death or exile (*cuius servus occisus est, is liberum arbitrium habet vel capitali crimine reum facere eum qui occiderit, vel hac lege* (*Aquilia*) *damnum persequi*, Gai. 3, 213). If the killing were done maliciously, and the plaintiff proceed by civil action, criminal prosecution under the *lex Cornelia de sicariis* should not be thereby prejudiced (*si dolo servus occisus sit, et lege Cornelia agere dominum posse constat: et si lege Aquilia egerit, praeiudicium fieri Corneliae non debet*, D. 9, 2, 23, 9).

14. **iniuriarum**: see text and notes below, p. 250.

cum suae mentis non sit; et hoc est verissimum. Cessabit igitur Aquiliae actio, quemadmodum, si quadrupes damnum dederit, Aquilia cessat, aut si tegula ceciderit. Sed et si infans damnum dederit, idem erit dicendum. Quodsi inpubes id fecerit, Labeo ait, quia furti tenetur, teneri et Aquilia eum; et hoc puto verum, si sit iam iniuriae capax. Si magister in disciplina vulneraverit servum vel occiderit, an Aquilia teneatur, quasi damnum iniuria dederit? et Iulianus scribit Aquilia teneri eum, qui eluscaverat discipulum in disciplina; multo magis igitur in occiso idem erit dicendum. Proponitur autem apud eum species talis: sutor, inquit, puero discenti ingenuo filio familias, parum bene facienti quod demonstraverit, forma calcei cervicem percussit, ut oculus puero perfunderetur. Dicit igitur Iulianus iniuriarum quidem actionem non competere, quia non faciendae iniuriae causa percusserit, sed monendi et docendi causa; an ex locato, dubitat, quia levis dumtaxat castigatio concessa est docenti; sed lege Aquilia posse agi non dubito, praeceptoris enim nimia saevitia culpae adsignatur.

Paul. D. 9, 2, 6

Qua actione patrem consecuturum ait, quod minus ex operis filii sui propter vitiatum oculum sit habiturus, et impendia, quae pro eius curatione fecerit. Occisum autem accipere debemus, sive gladio sive etiam fuste vel alio telo vel manibus (si forte strangulavit eum) vel calce petiit vel capite vel qualiter qualiter. Sed si quis

Ulp. D. 9, 2, 7

12. **ingenuo filio familias**: the *lex Aquilia* did not provide for injury to the body of a freeman, but an analogous action (*actio utilis*, see below) was allowed by which the father could recover for the cost of medical treatment and the loss of services caused by the injury of a son in his power. It is a maxim of Roman law that no valuation can be placed on the person of a freeman (*liberum corpus aestimationem non recipit*) and no damages could be recovered, therefore,

plus iusto oneratus deiecerit onus et servum occiderit, Aquilia locum habet; fuit enim in ipsius arbitrio ita se non onerare. Nam et si lapsus aliquis servum alienum onere presserit, Pegasus ait lege Aquilia eum teneri ita demum, si vel plus iusto se oneraverit vel neglegentius per lubricum transierit.

Gai. D. 9, 2, 8

Idem iuris est, si medicamento perperam usus fuerit, sed et qui bene secuerit et dereliquit curationem, securus non erit, sed culpae reus intellegitur. Mulionem quoque, si per imperitiam impetum mularum retinere non potuerit, si eae alienum hominem obtriverint, vulgo dicitur culpae nomine teneri. Idem dicitur et si propter infirmitatem sustinere mularum impetum non potuerit; nec videtur iniquum, si infirmitas culpae adnumeretur, cum affectare quisque non debeat, in quo vel intellegit vel intellegere debet infirmitatem suam alii periculosam futuram. Idem iuris est in persona eius, qui impetum

under the *lex Aquilia* for disfigurement of the person in the case stated in the text.

7. **Idem iuris est si medicamento**: the *lex Aquilia* provided originally only for damage done by direct physical contact of the offender with the property of the plaintiff (*damnum corpore corpori datum*). Subsequently, by the interpretation of the jurists, the meaning of the statute was extended so that killing (in Chap. 1) included many circumstances and acts only indirectly causing death. Actions were then granted by the praetor in these analogous cases, after the precedent of the *lex Aquilia* (*non ex verbis legis, sed ex interpretatione*). Such actions are called *utilis* and *in factum*. Where the damage to the definite thing was an indirect result of the offender's act, as causing a slave's death by setting a dog upon him, an *actio utilis* was granted (*damnum non corpore sed corpori datum*). Where there was no damage to the thing itself, but the deprivation of it caused the owner an injury, through an act of the defendant, an *actio in factum* was granted (*damnum nec corpore nec corpori datum*), as when one removed a slave's chains, permitting him to run away. All of the cases in the

equi, quo vehebatur, propter imperitiam vel infirmitatem retinere non poterit.

Gai. D. 50, 17, 132

Imperitia culpae adnumeratur.

Alfen. D. 9, 2, 52

Si ex plagis servus mortuus esset neque id medici inscientia aut domini neglegentia accidisset, recte de iniuria occiso eo agitur. Tabernarius in semita noctu supra lapidem lucernam posuerat; quidam praeteriens eam sustulerat: tabernarius eum consecutus lucernam reposcebat et fugientem retinebat; ille flagello, quod in manu habebat, in quo dolor inerat, verberare tabernarium coeperat, ut se mitteret; ex eo maiore rixa facta tabernarius ei, qui lucernam sustulerat, oculum effoderat; consulebat, num damnum iniuria non videtur dedisse, quoniam prior flagello percussus esset. Respondi, nisi data opera effodisset oculum, non videri damnum iniuria fecisse, culpam enim penes eum qui prior flagello percussit, residere; sed si ab eo non prior vapulasset, sed cum ei lucernam eripere vellet, rixatus esset, tabernarii culpa factum videri. In clivo Capitolino duo plostra onusta mulae ducebant; prioris plostri muliones conversum plostrum sublevabant, quo facile mulae ducerent: inter superius plostrum cessim ire coepit et cum muliones, qui inter duo plostra fuerunt, e medio exissent, posterius plostrum a priore percussum retro redierat et puerum cuiusdam obtriverat; dominus pueri consulebat, cum quo se agere oporteret. Respondi in causa ius esse positum; nam si muliones, qui superius plostrum sustinuissent, sua sponte se subduxissent et ideo factum esset, ut mulae plostrum retinere non possint atque onere ipso

text well illustrate the extension of the statute and the subtleties of the jurists' discussions.

22. **inter superius plostrum cessim**: the text is corrupt. Instead of *mulae ducerent: inter superius*

retraherentur, cum domino mularum nullam esse actionem, cum hominibus, qui conversum plostrum sustinuissent, lege Aquilia agi posse: nam nihilo minus eum damnum dare, qui quod sustineret mitteret sua voluntate, ut id aliquem feriret; veluti si quis asellum cum agitasset non retinuisset, aeque si quis ex manu telum aut aliud quid immisisset, damnum iniuria daret. Sed si mulae, quia aliquid reformidassent et muliones timore permoti, ne opprimerentur, plostrum reliquissent, cum hominibus actionem nullam esse, cum domino mularum esse. Quod si neque mulae neque homines in causa essent, sed mulae retinere onus nequissent aut cum coniterentur lapsae concidissent et ideo plostrum cessim redisset atque hi quo conversum fuisset onus sustinere nequissent, neque cum domino mularum neque cum hominibus esse actionem. Illud quidem certum esse, quoquo modo res se haberet, cum domino posteriorum mularum agi non posse, quoniam non sua sponte, sed percussae retro redissent.

Ulp. D. 9, 2, 27, 4

Huius legis secundum quidem capitulum in desuetudinem abiit. Tertio autem capite ait eadem lex Aquilia: 'Ceterarum rerum praeter hominem et pecudem occisos si quis alteri damnum faxit, quod usserit, fregerit, ruperit iniuria, quanti ea res erit in diebus

plostrum, Mommsen proposes the reading *mulae facerent iter: superius plostrum*.

2. **conversum plostrum**, etc., 'the mule-drivers of the wagon higher up the hill attempted to push the wagon which was beginning to roll backward, to lighten the burden for the mules,' etc.

23. **ruperit**: this word furnishes an example of the extension of meaning given by the ancient interpretation so that it was equivalent to *corrumpere* in this law. — **quanti ea res erit**: sc. *plurimi*. The omission of *plurimi* is accidental, as in practice it was the highest value of the previous thirty days, not the value named at the discretion of the judge.

triginta proximis, tantum aes domino dare damnas esto.' Si quis igitur non occiderit hominem vel pecudem, sed usserit, fregerit, ruperit, sine dubio ex his verbis legis agendum erit. Proinde si facem servo meo obieceris et eum adusseris, teneberis mihi. Item si arbustum meum vel villam meam incenderis, Aquiliae actionem habebo.

Injury to the Person (*Iniuria*)

Ulp. D. 47, 10, 1

Iniuria ex eo dicta est, quod non iure fiat; omne enim, quod non iure fit, iniuria fieri dicitur. Hoc generaliter. Specialiter autem iniuria dicitur contumelia. Interdum iniuriae appellatione damnum culpa

7. **Iniuria**: *iniuria* is an intentional insult to the person, honor, or reputation of another, or any malicious and insulting conduct which amounts to a wrongful disregard for another's personality. Such an insult may arise either by word (*verbis*) or deed (*re*), *i.e.* it may constitute an injury to the feeling by public reviling or by slander or libel; or to the person by violent acts such as assault, or by any other malicious conduct directed against another's honor or liberty. The meaning of *iniuria* was also extended to include any defamation which affected harmfully the social or business standing of another or reflected upon his financial position, business integrity, honor, chastity, and the like. It included, in fact, every attack upon the dignity of a free person. The attention which this delict received in the Twelve Tables (see note on *Poena*, p. 252) and the early law of the republic shows the high regard which the Romans attached to personal dignity and how carefully their desire for an unsullied reputation was safeguarded. Any diminution of the reputation was a most severe penalty (*e.g.* by a *nota censoria*), since it disqualified those so affected from exercising their full rights of citizenship. So carefully was the good name of Roman citizens guarded that insult offered even to the dead might give a right of action to the heir (*cadaveri defuncti fit iniuria*, see text below). The extreme sensitiveness of the Romans to ridicule and their hatred of gross personalities exercised considerable in-

datum significatur, ut in lege Aquilia dicere solemus; interdum iniquitatem iniuriam dicimus, nam cum quis inique vel iniuste sententiam dixit, iniuriam ex eo dictam, quod iure et iustitia caret, quasi non iuriam, contumeliam autem a contemnendo. Iniuriam autem fieri Labeo ait aut re aut verbis: re, quotiens manus inferuntur; verbis autem, quotiens non manus inferuntur, convicium fit; omnemque iniuriam aut in corpus inferri aut ad dignitatem aut ad infamiam pertinere: in corpus fit, cum quis pulsatur; ad dignitatem, cum comes matronae abducitur; ad infamiam, cum pudicitia adtemptatur. Item aut per semet ipsum alicui fit iniuria aut per alias personas. Per semet, cum directo ipsi cui patri familias vel matri familias fit iniuria; per alias, cum per consequentias fit, cum fit liberis meis vel servis meis vel uxori nuruive; spectat enim ad nos iniuria, quae in his fit, qui vel potestati nostrae vel affectui subiecti sint. Et si forte cadaveri defuncti fit iniuria, cui heredes bonorumve possessores exstitimus, iniuriarum nostro nomine habemus actionem; spectat enim ad existimationem nostram, si qua ei fiat iniuria. Idemque et si fama eius, cui heredes exstitimus, lacessatur.

fluence on the history and character of Latin comedy, as has often been pointed out.

3. **iniuste sententiam dixit**: the wrong which a judge commits in delivering an illegal sentence is noticed below among the quasi delicts.

7. **convicium**: *i.e.* a public reviling or uproar, collecting a crowd about a person or his house or shop (even though the owner is absent) by boisterous conduct. For derivation of the word see note, p. 103.

12. **aut per alias personas**: an action for insult may be brought by any person affected by the insult, whether the injury was done directly to him (*per semet ipsum*) or to some one so related to him that he has an interest in its reparation *per consequentias* (*qui vel potestati vel affectui subiecti*). The same insult might give an action to each person injured, no one

Inst. 4, 4, 1

Iniuria autem committitur non solum, cum quis pugno puta aut fustibus caesus vel etiam verberatus erit, sed etiam si cui convicium factum fuerit, sive cuius bona quasi debitoris possessa fuerint ab eo, qui intellegebat nihil eum sibi debere, vel si quis ad infamiam alicuius libellum aut carmen scripserit, composuerit, ediderit, dolove malo fecerit, quo quid eorum fieret, sive quis matrem familias aut praetextatum praetextatamve adsectatus fuerit, sive cuius pudicitia attemptata esse dicetur; et denique aliis pluribus modis admitti iniuriam manifestum est.

Poena autem iniuriarum ex lege duodecim tabularum propter membrum quidem ruptum talio erat: propter os

action barring the others (cf. Gai. 3, 221).

7. **dolo malo**: to constitute an offense giving rise to the *actio iniuriarum*, it was necessary that the wrong be done intentionally (*animo iniuriandi*), hence a blow received in jest or in an athletic contest, or a blow given to a freeman mistaken for a slave, was not *iniuria*. One who aids or advises in the publication of libelous writings or in causing any other form of insult becomes a participator in the wrong and is as liable as the doer himself.

10. **aliis pluribus modis**: some of the numerous ways in which an insult could be given, not mentioned in the text, were by summoning another into court to annoy him (*vexandi causa*); by wearing hair and beard uncut to incite hatred against another; by following another about in mourning clothes; by beating or torturing another's slave, so as to be offensive to the slave's master; by preventing another from enjoying his public or private privileges, such as fishing in the sea, making use of the public baths, sitting in the amphitheater, etc.

11. **Poena iniuriarum**: according to the Twelve Tables, the author of abusive writings and lampoons (*occentatio et malum carmen*) was guilty of a crime and punished either by death or, as some writers say, by beating with clubs. Serious bodily harm (*membrum ruptum*, 'mutilation of a limb') was punishable by retaliation in kind (*talio*, from *talis*, 'the like,' 'an eye for an eye'); the wrong could be satisfied, however, by pecuniary compensation at a scale fixed by the judge. Slight bodily harm (*os fractum aut collisum*) was punishable by a fine of three hundred asses

vero fractum nummariae poenae erant constitutae quasi in magna veterum paupertate. Sed postea praetores permittebant ipsis qui iniuriam passi sunt eam aestimare, ut iudex vel tanti condemnet, quanti iniuriam passus aestimaverit, vel minoris, prout ei visum fuerit. Sed poena quidem iniuriae, quae ex lege duodecim tabularum introducta est, in desuetudinem abiit; quam autem praetores introduxerunt, quae etiam honoraria appellatur, in iudiciis frequentatur. Nam secundum gradum dignitatis vitaeque honestatem crescit aut minuitur aestimatio iniuriae; qui gradus condemnationis et in servili persona non immerito servatur, ut aliud in servo actore, aliud in medii actus homine, aliud in vilissimo vel compedito constituatur. Sed et lex Cornelia de iniuriis loquitur et iniuriarum actionem introduxit. Quae competit ob eam rem, quod se pulsatum quis verberatumve domumve suam vi introitam esse dicat. Domum autem accipimus, sive in propria domo quis habitat sive in conducta vel gratis sive hospitio

(about $15) for an injured freeman and of one hundred and fifty asses for a slave. Other injuries were punishable by a fine of twenty-five asses (about $1.25). Subsequently, the praetor recognized the substitution of damages for the more savage law of retaliation, and instead of fixed penalties, he allowed an *actio iniuriarum aestimatoria*, by which the penalty varied according to the circumstances of the case (*secundum gradum dignitatis vitaeque honestatem*) as estimated by the judge (*ex aequo et bono*). Under this action the defendant, if condemned, was made infamous (*infamia*). According to the *lex Cornelia* (81 A.D.) a special action was given in cases of serious assault or forcible entry (*pulsatum, verberatum, domum vi introitam*). *Verberare* is to beat or wound; *pulsare* is to push or strike with painless blow (*verberare est cum dolore caedere, pulsare sine dolore*). The injured party had the option of proceeding by a civil action or by a criminal prosecution.

8. **in iudiciis frequentatur:** *is now observed in the courts.*

receptus sit. Atrox iniuria aestimatur vel ex facto, veluti si quis ab aliquo vulneratus fuerit vel fustibus caesus; vel ex loco, veluti si cui in theatro vel in foro vel in conspectu praetoris iniuria facta sit; vel ex persona, veluti si magistratus iniuriam passus fuerit, vel si senatori ab humili iniuria facta sit, aut parenti patronoque fiat a liberis vel libertis; aliter enim senatoris et parentis patronique, aliter extranei et humilis personae iniuria aestimatur. Nonnumquam et locus vulneris atrocem iniuriam facit, veluti si in oculo quis percussus sit. Parvi autem refert, utrum patri familias an filio familias talis iniuria facta sit; nam et haec atrox aestimabitur. In summa sciendum est de omni iniuria eum qui passus est posse vel criminaliter agere vel civiliter. Et si quidem civiliter agatur, aestimatione facta secundum quod dictum est poena imponitur. Sin autem criminaliter, officio iudicis extraordinaria poena reo irrogatur. Non solum autem is iniuriarum tenetur qui fecit iniuriam, hoc est qui percussit; verum ille quoque continebitur, qui dolo fecit vel qui curavit, ut cui mala pugno

1. **Atrox iniuria:** an injury might be aggravated by the means employed in accomplishing the act (*ex facto*); or by the nature of the place where the act was perpetrated (*ex loco*); or by the quality of the persons receiving and inflicting the injury (*ex persona*); or by the part of the body injured (*loco vulneris*). In case of *iniuria atrox* the praetor fixed the maximum of damages (usually at the amount of bail), which the judge regularly allowed in case of conviction. A slave guilty of an aggravated injury was condemned to the mines; if guilty of an ordinary injury, he might be surrendered noxally or delivered over to the offended party to be whipped.

16. **extraordinaria poena:** offenses of a public character were usually tried criminally before the praetor himself (*extra ordinem*) without reference of the case to a judge. Some of the penalties mentioned are death, banishment, and relegation. The proceeding *extra ordinem* was the more usual in the later law.

percuteretur. Haec actio dissimulatione aboletur ; et ideo, si quis iniuriam dereliquerit, hoc est statim passus ad animum suum non revocaverit, postea ex paenitentia remissam iniuriam non poterit recolere.

Obligations qvasi ex Delicto

5 Inst. 4, 5

Si iudex litem suam fecerit, non proprie ex maleficio obligatus videtur. Sed quia neque ex contractu obligatus est et utique peccasse aliquid intellegitur, licet per imprudentiam ; ideo videtur quasi ex

1. **dissimulatione**: a right of action for insult was extinguished if the affront was not resented at once or was passed over in silence. The right to sue thus lost did not revive, and, in all cases by the praetorian law, proceedings must be begun within the judicial year following the offense (*annus utilis*).

Obligations quasi ex Delicto: the delicts already noticed do not exhaust the list of wrongful acts creating legal obligations. Quasi delicts are cases of wrongdoing merely resembling delicts in substance, but exactly like them in rendering the offender liable to a penalty or damages in a civil suit. The characteristic requirements of delicts, technically so called, were damage to the property of another (*damnum*) or injury to the person of another (*iniuria*), done with evil intent (*dolus*) or through culpable negligence (*culpa*). Most of the quasi delicts, as given in the Institutes of Justinian, however, include actions granted by the praetor against persons who neither directly caused damage nor had any evil intent in the wrong done, though the law presumed them to have been in a position to prevent the wrong. This applies to all quasi delicts in the text, except the first mentioned (*iudex qui litem suam fecerit*).

5. **Si iudex litem suam fecerit**: a judge was said to 'make a cause his own' when he was guilty of corrupt motives or negligence (including a violation of the rules of law through ignorance, *per imprudentiam : imperitia culpae adnumeratur*) in the performance of his official duties. A judge treated the case as his own, *e.g.* when he imposed a heavier penalty than was named in the praetor's formula or in the statute. He was liable for damages in a civil suit brought by the injured party. It should be noticed that 'judge' is here

maleficio teneri, et in quantum de ea re aequum religioni iudicantis videbitur, poenam sustinebit. Item is, ex cuius cenaculo vel proprio ipsius vel conducto vel in quo gratis habitabat deiectum effusumve aliquid est, ita ut alicui noceretur, quasi ex maleficio obligatus intellegitur; ideo autem non proprie ex maleficio obligatus intellegitur, quia plerumque ob alterius culpam tenetur aut servi aut liberi. Cui similis est is, qui ea parte, qua vulgo iter fieri solet, id positum aut suspensum habet, quod potest, si ceciderit,

used in the Roman sense (*iudex*, *i.e.* a private person exercising functions similar in some respects to both judge and juror in our judicial system). The Roman judge, though a layman, was rendered liable for ignorance of law because he had free access to the praetor for construction of edicts and law involved in the case, and it was the duty of the *iudex*, furthermore, to take advice of the *iuris prudentes* on knotty points.

7. ob alterius culpam tenetur: persons hurling or pouring things from the windows or roof of the large and numerously tenanted apartment houses of Rome (*cenacula*) could generally be detected only indirectly from the place out of which the damage came. The praetor, therefore, gave the *actio de deiecto effusove* against the occupier of the premises, though he personally did no wrong. The latter had redress against the actual wrongdoer, *e.g.* a lodger or guest. The liability for this quasi delict was for double the damage done (*actio mixta*). If the testimony of Juvenal, *Sat.* 3, 268–274, is to be relied on, there must have been much need of this remedy in his day. Cf. D. 9, 3, 1; 44, 7, 5, 5.

9. positum aut suspensum: though no damage had actually been done to another, the praetor granted the *actio de posito* (*exposito*) *et suspenso* against any one who placed or hung anything from the eaves or any projection overhead, which might do damage to any person passing or standing below in a public thoroughfare or place. This action for the recovery of a *private penalty* was open to any one interested, *i.e.* it was an *actio popularis*, or an action open to any informer who could bring suit, not merely to enforce his own private right, but rather a right of the public. Although the law was of the nature of a police regulation, the plaintiff could retain the penalty.

alicui nocere; quo casu poena decem aureorum constituta est. De eo vero quod deiectum effusumve est dupli quanti damnum datum sit constituta est actio. Ob hominem vero liberum occisum quinquaginta aureorum poena constituitur; si vero vivet nocitumque ei esse dicetur, quantum ob eam rem aequum iudici videtur, actio datur; iudex enim computare debet mercedes medicis praestitas ceteraque impendia, quae in curatione facta sunt, praeterea operarum, quibus caruit aut cariturus est ob id quod inutilis factus est. Si filius familias seorsum a patre habitaverit et quid ex cenaculo eius deiectum effusumve sit, sive quid positum suspensumve habuerit, cuius casus periculosus est; Iuliano placuit in patrem nullam esse actionem, sed cum ipso filio agendum. Quod et in filio familias iudice observandum est, qui litem suam fecerit. Item exercitor navis aut cauponae aut stabuli de dolo aut furto, quod in nave aut in caupona aut in stabulo factum erit, quasi ex maleficio teneri videtur, si modo ipsius nullum est maleficium, sed alicuius eorum, quorum opera navem aut cauponam aut stabulum exerceret; cum enim neque ex contractu sit adversus eum constituta haec actio et aliquatenus culpae reus est, quod opera malorum hominum uteretur, ideo quasi ex maleficio teneri videtur. In his autem casibus in factum actio competit, quae heredi quidem datur, adversus heredem autem non competit.

Inst. 4, 9.

Animalium nomine, quae ratione carent, si quidem lascivia aut fervore aut feritate pau-

15. exercitor navis: by the praetorian *actio doli et furti adversus nautas, caupones, stabularios*, ship-owners, innkeepers, and livery-stable keepers were liable for the wrongs committed by their servants for double the value of the thing injured or lost. Here the principal (*exercitor*) was liable not for any direct fault of his own

periem fecerint, noxalis actio lege duodecim tabularum prodita est (quae animalia si noxae dedantur, proficiunt reo ad liberationem, quia ita lex duodecim tabularum scripta est); puta si equus calcitrosus calce percusserit aut bos cornu petere solitus petierit. Haec autem actio in his, quae contra naturam moventur, locum habet; ceterum si genitalis sit feritas, cessat. Denique si ursus fugit a domino et sic nocuit, non potest quondam dominus conveniri, quia desinit dominus esse, ubi fera evasit. Pauperies autem est damnum sine iniuria facientis datum; nec enim potest animal iniuriam fecisse dici, quod sensu caret. Haec quod ad noxalem actionem pertinet. Ceterum sciendum est aedilicio edicto prohiberi nos canem, verrem, aprum, ursum, leonem ibi habere, qua vulgo iter fit; et si adversus ea factum erit et nocitum homini libero esse dicetur, quod bonum et aequum iudici videtur, tanti dominus condemnetur, ceterarum rerum, quanti damnum datum sit, dupli. Praeter has autem aedilicias actiones

other than his selection of dishonest servants. The person injured might also bring an *actio furti* or *legis Aquiliae* against the actual offender.

1. **noxalis actio**: it has already been noticed that for any delict committed by a slave the master is rendered liable to a noxal action (cf. note on *iudicium*, p. 240). In this case, the master may assume directly the responsibility for the delict, or surrender the slave to the injured party (*noxae deditio*). By a curious provision of the Twelve Tables, an action was granted which compelled the owner of an animal (not restricted to quadrupeds) to repair the harm (*pauperies*) done by it or else surrender it to the injured party (*actio de pauperie*). The owner at the time of suit is liable, not the owner at the time of the injury (*noxa caput sequitur*). The harm must also be caused by the animal acting contrary to its natural disposition (*contra naturam*).

13. **aedilicio edicto**: the general police supervision of the aedile appears from this text. Cf. also note on *et*, p. 60.

et de pauperie locum habebit; numquam enim actiones praesertim poenales de eadem re concurrentes alia aliam consumit.

The Law of Inheritance (*Hereditas*)

Gai. 2, 97

Hactenus tantisper admonuisse sufficit quemadmodum singulae res nobis adquirantur. Nam legatorum ius, quo et ipso singulas res adquirimus, opportunius alio loco referemus. Videamus itaque nunc, quibus modis per universitatem res nobis adquirantur. Ac prius de hereditatibus dispiciamus.

Iulian. D. 50, 17, 62

Hereditas nihil aliud est, quam successio in universum ius quod defunctus habuerit.

8. per universitatem res adquirantur: having treated of the way in which rights over particular things (*res singulae*) are acquired (cf. text and note on *Acquisition*, p. 165), the Institutes of Gaius and Justinian proceed to the modes of acquiring rights *per universitatem*, *i.e.* the acquisition of all the rights and duties of another in one mass or entirety (*universitas rerum*, as a unit, 'in one bundle'). This complete succession to the entire legal personality of another may be accomplished in several ways, of which the most important are arrogation and inheritance. For arrogation see note p. 135 and text. By the Roman law of succession the entire property of a deceased person (*defunctus*), with the exception of those rights and duties which are distinctly personal and, therefore, perished with him, constituted his inheritance. This estate remains a unit (*universitas iuris*). In theory it is not divided piecemeal and scattered among the heirs. Each heir succeeds to the entire estate as a unit, not to any individual thing belonging to the estate, *i.e.* the heirs (whether one or more) succeed *per universitatem* to the exact legal position of the deceased at the time of his death, inheriting his rights and obligations so far as they have not perished with him (*hereditas nihil aliud est, quam successio in universum ius quod defunctus habuerit*, D. 50, 17, 62; *hereditas personae defuncti, qui eam reliquit, vice fungitur*, D. 30, 116, 3).

Pompon. D. 29, 2, 37 Heres in omne ius mortui, non tantum singularum rerum dominium succedit, cum et ea, quae in nominibus sint, ad heredem transeant.

Iulian. D. 38, 16, 6 Lex duodecim tabularum eum vocat ad hereditatem, qui moriente eo, de cuius bonis quaeritur, in rerum natura fuerit, vel si vivo eo conceptus est,

Celsus, D. 38, 16, 7 quia conceptus quodammodo in rerum natura esse existimatur.

Floren. D. 29, 2, 54 Heres quandoque adeundo hereditatem iam tunc a morte successisse defuncto intellegitur.

3. **in nominibus**: *liabilities*. *Nomen* was originally the name of the debtor and item of debt entered in the domestic ledger of the creditor. From that it came to mean the obligation arising from any *debitum* (see notes on *Litteris* and *Fit*, p. 206–7). By the very nature of universal succession, the heir, as family representative of the deceased, succeeded not only to the property but also to the liabilities, *i.e.* to the entire legal personality of the deceased (modified by the praetor by the *ius abstinendi*, see below, note on *Heredes*, p. 282).

6. **si vivo eo conceptus est**: see note on *Qui*, p. 78.

9. **adeundo hereditatem**: *deferre* and *adire* are technical terms marking two important stages in the devolution of an estate. *Delatio* (or *hereditas delata*) is the offer of the inheritance to the one entitled to become heir, so that he has merely to decide whether he will accept or refuse; *aditio* (*hereditas adita*) is the acceptance of the heirship. This may not occur until the assets and liabilities have been duly inquired into. *Delatio*, or the offer, is made in one of two ways, by testament or by operation of law (*hereditas testamentaria*, *hereditas ab intestato*).

10. **a morte successisse**: in the interval between death and the acquisition of the inheritance by the heir (*quamvis postea adeatur*), the estate has an independent legal existence as an artificial person. Although the owner of the property is dead, the estate is not a derelict to be seized by the first occupier, but is in the eye of the law an independent person, called *hereditas iacens*, which has the powers of a natural person to acquire rights and to incur obligations, *e.g.* slaves belonging to the inheritance may enter into lawful agreements to acquire for its benefit and they may become heirs to other estates

Paul. D. 50, 17, 138 — Omnis hereditas, quamvis postea adeatur, tamen cum tempore mortis continuatur.

Ulp. D. 29, 2, 39 — Quam diu potest ex testamento adiri hereditas, ab intestato non defertur.

Pompon. D. 50, 17, 7 — Ius nostrum non patitur eundem in paganis et testato et intestato decessisse; earumque rerum naturaliter inter se pugna est 'testatus' et 'intestatus.'

Mod. D. 28, 1, 1 — Testamentum est voluntatis nostrae iusta sententia de eo, quod quis post mortem suam fieri velit.

in the interest of the inheritance of which they form a part. When the *hereditas* is once vested in the heir (*i.e.* after *aditio*), his succession dates from the moment of the deceased's death.

3. **Quam diu potest ex testamento adiri hereditas:** inheritance may devolve upon the heir by testament and by operation of law, whence arises the distinction between testamentary succession (*testamentaria hereditas*) and intestate or legal succession (*legitima hereditas, ab intestato*). The latter occurs only in the absence of a valid testament. Since the inheritance is viewed as an entirety (*universitas rerum*) and a testament takes precedence over intestate succession, the one excluding the other (*inter se pugna est*), if a testator should nominate an heir for part of his property only, the legal heirs (*heredes legitimi*) do not succeed to the remaining part, but the will disposes of the entire estate (*nemo pro parte testatus, pro parte intestatus decedere potest*). For exception in case of soldiers see below, note on *Militibus*, p. 269.

9. **Testamentum est voluntatis:** the primary purpose and essential requirement of a Roman will was the appointment of an heir, not the disposition of an estate. The Romans did not originate the testament, but they very early felt the importance of will-making to prevent the possibility of dying without a representative to perform the sacred rites of the dead, to protect the memory of the testator, and to obviate the injustice to cognates which arose under the early law of intestate succession. They became a nation of will-makers and developed a detailed system of testamentary law (*iure civili*), with features peculiarly Roman. Although intestate succession is

Labeo, D. 28, 1, 2

In eo qui testatur eius temporis, quo testamentum facit, integritas mentis, non corporis sanitas exigenda est.

Gai. D. 28, 1, 4

Si quaeramus, an valeat testamentum, in primis animadvertere debemus, an is qui fecerit testamentum habuerit testamenti factionem, deinde, si habuerit, requiremus, an secundum regulas iuris civilis testatus sit.

Ulp. 20, 10

Filius familiae testamentum facere non potest, quoniam nihil suum habet, ut testari de eo pos-

historically the older, Gaius and Justinian treat of the testament first, as if it were the more important. Our word *will* is a translation of *voluntas*, *a choice*, or *expression of intention*, but it does not, like our English word, indicate the written instrument itself. The false etymology of *testamentum* by Servius Sulpicius, discussed by Gellius 7, 12, 2, is repeated by Ulpian and Justinian, Inst. 2, 10: *testamentum ex eo appellatur, quod testatio mentis est* (as if the suffix *-mentum* were from *mens*, cf. *vestimentum*, *alimentum*, '*et alia mille*'). See also notes on *curias*, p. 45, and *quasi*, p. 106. — **iusta sententia**: *iusta*, 'according to legal formalities,' see note on *ex iusta*, p. 81.

6. **testamenti factionem**: this term signifies the capacity to take any part in the making of a will or to receive any benefit under a will, *i.e.* testator, witnesses, and heir must have *testamenti factio* with one another, or the capacity required by law to perform their several parts. Capacity to make a will (*testamenti factio activa*) requires capacity to be owner and to alienate as owner. It is, therefore, denied those who lack independent judgment or powers of volition and perfect capacity of disposition (*impuberes*, *furiosi*, *prodigi*). The *civis Romanus paterfamilias* alone has complete testamentary capacity. The *filiusfamilias* can, however, make testamentary disposition of his *peculium castrense* and *quasi castrense*. Certain persons, unable to make a testament in the usual way, must conform to certain special provisions of law (deaf, mute, blind, and those unable to write). Incapacity to make a will does not necessarily exclude one from being heir or witness, *i.e.* having *testamenti factio passiva* (Inst. 2, 19, 4).

9. **Filius familiae testamentum facere non potest**: in the law of the

sit. Sed divus Augustus constituit, ut filius familiae miles de eo peculio quod in castris adquisivit testamentum facere possit. Qui de statu suo incertus est factus, quod patre peregre mortuo ignorat se sui iuris esse, facere testamentum non potest. Impubes, licet sui iuris sit, facere testamentum non potest, quoniam nondum plenum iudicium animi habet. Mutus, surdus, furiosus itemque prodigus cui lege bonis interdictum est, testamentum facere non possunt: mutus, quoniam verba nuncupationis loqui non potest; surdus, quoniam verba familiae emptoris exaudire non potest; furiosus, quoniam mentem non habet, ut testari de sua re possit; prodigus, quoniam commercio illi interdic-

republic *filiifamilias* had no active proprietary capacity, *i.e.* they were not free to alienate and could acquire only. Under Augustus, soldiers were freed from this disability by special privilege. This became a permanent rule under Trajan (see below, note on *Militibus*, p. 269). In the management and disposition of all property acquired by reason of military service (*peculium castrense*), a *filiusfamilias miles* was considered free from the power of his father. The *peculium castrense* included all property acquired by a soldier as pay, whatever was given or bequeathed to him for campaign purposes, all acquisitions from fellow-soldiers, and land purchased by savings from his pay. In the later empire (after Constantine), government and court officials, advocates, the clergy, and those especially favored by the emperor, though *filiifamilias*, were allowed free disposition of their earnings, as if engaged in the public service like soldiers (*quasi castrense*).

3. **incertus est factus**: in addition to the uncertainty whether the *paterfamilias* away from home was alive or dead, persons in any other way uncertain of their status, as whether they had been properly emancipated and were free persons in law and fact, were unable to make a will (*qui incertus de statu suo est, certam legem testamento dicere non potest*, D. 28, 1, 14).

11. **furiosus quoniam mentem non habet**: the *furiosus* could, however, make a will during a lucid interval, and a will made before he was mentally incapacitated was valid. In case of the *prodigus* also, a will made before the formal *bonis interdictio* of the praetor was valid. Cf. note on *Curatores*, p. 155.

tum est et ob id familiam mancipare non potest. Latinus Iunianus, item is qui dediticiorum numero est, testamentum facere non potest: Latinus quidem, quoniam nominatim lege Iunia prohibitus est, is autem qui dediticiorum numero est, quoniam nec quasi civis Romanus testari potest, cum sit peregrinus, nec quasi peregrinus, quoniam nullius certae civitatis civis est, ut secundum leges civitatis suae testetur. Feminae post duodecimum annum aetatis testamenta facere possunt tutore auctore, donec in tutela sunt. Servus publicus populi Romani partis dimidiae testamenti faciendi habet ius.

4. **lege Iunia**: see text and note on *Libertorum*, p. 89.

8. **Feminae post duodecimum annum**: in the most ancient times, women could not make wills because they were excluded from the public assembly and the army (*calatis comitiis*, *in procinctu*). After the testament *per aes et libram* was introduced, women (*sui iuris*) were capable, but inasmuch as they were under guardianship (unless relieved by the *lex Papia Poppaea*, see text and note on *ex lege*, p. 152), they required the authority of their guardians. To obviate this difficulty, the jurists devised a fictitious marriage with *manus* (*coemptio fiduciaria*). The ward conveyed herself by *mancipatio* to her husband (see note on *Coemptione*, p. 126), who reconveyed her by remancipation, in accordance with a trust obligation (*fiduciae causa*), to a third person, by whom she was finally manumitted. In this way the woman obtained a status which gave her testamentary capacity. Vestal virgins, being free from *patria potestas* and from guardianship, had from very early times capacity to make a will. As they had no legal heirs (and could be heir to no one), if they died intestate, their property escheated to the state (Gell. 1, 12, 18).

10. **Servus publicus**: *testamenti factio activa* required of the testator the possession of the *ius commercii*. This excluded slaves and those in a similar status, but slaves of the Populus Romanus were by special privilege capable of disposing by testament of half of their *peculium*. Slaves captured in war became the property of the state. Some were sold in open market under supervision of the aediles, while others were retained as property of the Roman people and were assigned to various public duties. The exact legal position

Gai. 1, 115

Olim etiam testamenti faciendi gratia fiduciaria fiebat coemptio; tunc enim non aliter feminae testamenti faciendi ius habebant, exceptis quibusdam personis, quam si coemptionem fecissent remancipataeque et manumissae fuissent; sed hanc necessitatem coemptionis faciendae ex auctoritate divi Hadriani senatus remisit.

Gai. 2, 101

Testamentorum autem genera initio duo fuerunt: nam aut calatis comitiis testamentum faciebant, quae comitia bis in anno testamentis faciendis

of *servi publici* is not entirely understood. That they had privileges not granted private slaves is certain. They were almost entirely of the male sex, often occupied public quarters, received a certain sum for their sustenance (*cibaria*), and were capable of entering into a quasi marriage with a free woman. In this fact Mommsen sees a possible explanation of their testamentary capacity over half of their holdings (*Staatsrecht*, 1, 320 f.). In addition to those mentioned in the text, the following were incapable of making a will: those condemned for libel (*ob carmen famosum*); those outlawed by the *interdictio aquae et ignis*; those deported to an island; criminals condemned to fight as gladiators (*ad ferrum*), to fight with beasts, or to work in the mines (*servi poenae*); captives; hostages.

9. calatis comitiis testamentum: the oldest form of will was of a public character. In the earliest times the property of a deceased *paterfamilias* descended to his natural heirs by the operation of law. When it became possible to substitute another than the natural heir, or to nominate a stranger to prevent the possibility of dying without an heir, it became a matter of importance to the religious interests of the state and to the testator's *gens*. The *comitia curiata* was summoned (*calare*, *calata comitia*) twice each year (probably the 24th of March and the 24th of May) to sanction and to witness the wills of citizens. The pontiffs supervised the procedure. The authority to direct the devolution of an estate out of the regular channel required a special enactment, a testament (*legem testamento dicere*) which took the form and character of a *lex* enacted by the people (*i.e.* patricians).

destinata erant, aut in procinctu, id est cum belli causa arma sumebant; procinctus est enim expeditus et armatus exercitus. Alterum itaque in pace et in otio faciebant, alterum in proelium exituri. Accessit deinde tertium genus testamenti, quod per aes et libram agitur. Qui neque calatis comitiis neque in procinctu testamentum fecerat, is si subita morte urguebatur, amico familiam suam, id est patrimonium suum, mancipio dabat, eumque rogabat quid cuique post mortem suam dari vellet. Quod

1. **in procinctu**: the inconvenience of making a will in the formal assembly would be especially felt by soldiers in active service. As the army in the field in the earliest times was merely a body of citizens, the counterpart of the *comitia* at home, every soldier was allowed to declare his will orally, in the presence of his comrades, when about to enter battle. Serv. *Aen.* 10, 241.

4. **Accessit tertium genus testamenti**: the will made *per aes et libram* (*mancipatio*) was a strictly private will of very ancient origin, which could be made at any time and was especially employed in emergencies. In its historical development it shows two phases, in the earlier of which the transaction is entirely oral; in the later, it is the oral confirmation of a written document. In the former the testator conveys, with all the formalities of manicipation, his entire property to a friend, called *familiae emptor*, at the same time making a formal declaration (*nuncupatio*) that the conveyance is for the purpose of inheritance. The *familiae emptor* is made heir (or as Sohm says, 'executor of the will'), upon whom is charged the duty of carrying out the provisions of the will according to the terms of the nuncupatory part of the transaction declared in the presence of the witnesses. Later on, when writing became more common, the heir is named in the written document (*testamenti tabulae*), which contained all the dispositions of the testator. The mancipatory form is still employed, but the *familiae emptor*, no longer heir, is retained merely for the sake of form (*dicis gratia*). The *nuncupatio* is a formal confirmation of this document as a last will, fully attested by the five witnesses, the *libripens*, and the *familiae emptor*. The *testamentum per aes et libram* in these two phases was the usual will of the republican and classical periods of the civil law.

testamentum dicitur per aes et libram, scilicet quia per mancipationem peragitur. Sed illa quidem duo genera testamentorum in desuetudinem abierunt; hoc vero solum, quod per aes et libram fit, in usu retentum est. Sane nunc aliter ordinatur, quam olim solebat. Namque olim familiae emptor, id est qui a testatore familiam accipiebat mancipio, heredis locum obtinebat, et ob id ei mandabat testator, quid cuique post mortem suam dari vellet; nunc vero alius heres testamento instituitur, a quo etiam legata relinquuntur, alius dicis gratia propter veteris iuris imitationem familiae emptor adhibetur. Eaque res ita agitur: qui facit testamentum, adhibitis, sicut in ceteris mancipationibus, quinque testibus civibus Romanis puberibus et libripende, postquam tabulas testamenti scripserit, mancipat alicui dicis gratia familiam suam; in qua re his verbis familiae emptor utitur 'familia pecuniaque tua endo mandatelam custodelamque meam, quo tu iure testamentum facere possis secundum legem publicam, hoc aere' et ut quidam adiciunt 'aeneaque libra, esto mihi empta'; deinde aere percutit libram, idque aes dat testatori velut pretii loco; deinde testator tabulas testamenti tenens ita dicit 'haec ita ut in his tabulis cerisque scripta sunt, ita do, ita

14. postquam tabulas testamenti scripserit: with the introduction of writing, it became usual for the testator to prepare, or have prepared for him, a document containing his will. This was produced before the witnesses and sealed by them, their names being attached to their respective seals. This form had the advantage of secrecy, and the will could be more easily proved. In theory the whole proceeding *per aes et libram* employed for will-making was oral, the *nuncupatio* in the later phase of this form of will being the more important part. The written document, witnessed by seven persons, became the model for the later praetorian will.

22. in his tabulis cerisque: wills might be written on wood, parchment, paper, or any other suitable material, but the will described

lego, ita testor itaque vos Quirites testimonium mihi perhibetote,' et hoc dicitur nuncupatio: nuncupare est enim palam nominare, et sane quae testator specialiter in tabulis testamenti scripserit, ea videtur generali sermone nominare atque confirmare.

Ulp. 20, 3

Qui in potestate testatoris est aut familiae emptoris, testis aut libripens adhiberi non potest, quoniam familiae mancipatio inter testatorem et familiae emptorem fit et ob id domestici testes adhibendi non sunt. Filio familiam emente pater eius testis esse non

here was written with a stilus on wax-covered pieces of wood (*tabulae ceraeque*). The term *tabulae* was, however, used for a will written on any other material, and *cera* was used for the pages of the tablets (see Hor. *Sat.* 2, 5, 24). Tablets used for wills were generally of three or more leaves (*triptycha*, *polyptycha*) fastened together by a wire passing through the wooden rim on the long side of the tablet. The inner leaves were coated with wax on both sides, the two outer, only on the inside. The will was written on the inner pages, the writing running the long way of the tablet. To avoid tampering with the will and to secure secrecy, nothing but the name of the testator was to be written on the first two inner pages, which alone were to be shown to the witnesses (according to a SC under Nero). The whole tablet was fastened together into a *codex* by strings piercing the rim, and the document was then closed and secured against falsification by the attachment of the seals of the five witnesses, the *libripens*, and the *familiae emptor*, each one adding his name. There was no signing of the will at the end, but it was customary to place the date there. Many provisions were made to prevent fraud, by the *lex Cornelia testamentaria* (time of Sulla's dictatorship) and subsequent laws.

7. **testis adhiberi non potest**: those disqualified from acting as witnesses were: slaves, *impuberes*, madmen, prodigals, women, the deaf, the dumb, and those pronounced *intestabiles*, *i.e.* those whom the law considers as dishonest and unworthy to take part in formal legal proceedings. They were those convicted of bribing magistrates (*repetundarum damnatus*); of libel (*ob carmen famosum*); of adultery; and in christian times, heretics and apostates. Wo-

potest. Ex duobus fratribus, qui in eiusdem patris potestate sunt, alter familiae emptor, alter testis esse non potest, quoniam quod unus ex his mancipio accipit adquirit patri, cui filius suus testis esse non debet. Mutus, surdus, furiosus, pupillus, femina neque familiae emptor esse neque testis libripensve fieri potest. Latinus Iunianus et familiae emptor et testis et libripens fieri potest, quoniam cum eo testamenti factio est.

Ulp. D. 28, 1, 20

Qui testamento heres instituitur, in eodem testamento testis esse non potest.

Ulp. D. 29, 1, 1

Militibus liberam testamenti factionem primus quidem divus Iulius Caesar concessit, sed ea concessio temporalis erat. Postea vero primus divus Titus dedit, post hoc Domitianus, postea divus Nerva plenissimam

men could not be witnesses to the ancient will, because they could not appear in the *comitia*, but long after the reason for this disability had passed away, with characteristic adherence to old forms, the Romans continued this restriction. A close relationship of the parties caused incapacity to witness a will, except between *paterfamilias* and *filiusfamilias* where the latter's will disposed of his *peculium castrense*.

6. **Latinus Iunianus**: although by the ius civile *Latini* could not be testators, heirs, or legatees (except in case of the wills of soldiers in service), they could be witnesses because they had *commercium* and *testamenti factio* to this degree with the testator. Cf. note on *Libertorum*, p. 89.

11. **Militibus liberam testamenti factionem concessit**: Trajan made the privileges which had been extended to soldiers settled rules of law by issuing instructions to the provincial governors (by *mandata*) to observe them as such. A soldier's will to be valid must be declared to witnesses understanding the nature of the transaction, and an heir must be named for, at least, part of the estate. If an heir were named for only a part (*unum ex fundo heredem*), the rest of the estate devolved according to the law of intestate succession. The soldier might even appoint different heirs for different specific things. Such a will was valid for one year after honorable dismissal. All of these privileges were denied *pagani*, *i.e.* civilians.

indulgentiam in milites contulit, eamque et Traianus secutus est et exinde mandatis inseri coepit caput tale. Caput ex mandatis: 'Cum in notitiam meam prolatum sit subinde testamenta a commilitonibus relicta proferri, quae possint in controversiam deduci, si ad diligentiam legum revocentur et observantiam, secutus animi mei integritudinem erga optimos fidelissimosque commilitones simplicitati eorum consulendum existimavi, ut quoquomodo testati fuissent, rata esset eorum voluntas. Faciant igitur testamenta quo modo volent, faciant quo modo poterint sufficiatque ad bonorum suorum divisionem faciendam nuda voluntas testatoris.'

Ulp. D. 29, 1, 6 Si miles unum ex fundo heredem scripserit, creditum quantum ad residuum patrimonium intestatus decessisset; miles enim pro parte testatus potest decedere, pro parte intestatus.

Ulp. 23, 1 Testamentum iure factum infirmatur duobus modis, si ruptum aut inritum factum sit. Rumpitur testamentum mutatione, id est si postea aliud testa-

17. **Testamentum infirmatur duobus modis**: a testament may be totally null from the very beginning (*testamentum non iure factum*) because it failed to meet the complete requirement of a valid instrument, *e.g.* by non-observance of the required form; by failure to appoint a competent heir; by the testator's lack of testamentary capacity; by passing over a *suus heres*. A testament properly made, however, lost its legal significance (*infirmatur*) in two general ways, as *testamentum ruptum* and *testamentum irritum* (*non ratum*). A *testamentum ruptum* occurred: by the subsequent agnation of a *suus heres*; by making a new will (*testamentum posterius iure factum*). For explanation of *suus heres* see below, note on *Heredes*, p. 273. Revocation of a will without the necessity of making a new one was introduced by the praetor. For *agnatio postumi*, see notes on *Agnatic*, p. 107, and *postumi*, p. 146. The testament was null *ab initio* if the *suus heres* had been simply passed over (*sui heredes vel instituendi sunt vel exheredandi*). A testament was *irritum:* by the tes-

mentum iure factum sit. Item agnatione, id est si suus heres agnascatur, qui neque heres institutus neque ut oportet exheredatus sit. Agnascitur suus heres aut agnascendo aut adoptando aut in manum conveniendo aut in locum sui heredis succedendo, velut nepos mortuo filio vel emancipato, aut manumissione, id est si filius ex prima secundave mancipatione manumissus reversus sit in patris potestatem. Inritum fit testamentum, si testator capite deminutus fuerit, aut si iure facto testamento nemo extiterit heres. Si is qui testamentum fecit ab hostibus captus sit, testamentum eius valet, si quidem reversus fuerit, iure postliminii, si vero ibi decesserit, ex lege Cornelia, quae perinde successionem eius confirmat, atque si in civitate decessisset. Si septem signis testium signatum sit testamentum, licet iure civili ruptum vel inritum factum sit, praetor scriptis heredibus iuxta tabulas bonorum posses-

tator's loss of testamentary capacity after execution of his will, *e.g.* by becoming *alieni iuris*; by failure of the heir to take the inheritance (*testamentum destitutum*). By *ius civile* the testator must retain *testamenti factio* from the time of execution of his will up until death, but the praetor required it only at the time of execution and at death. A will, therefore, which had become ineffectual by the civil law, might become effectual again by the praetorian law.

6. **prima secundave mancipatione**: see note on *qui*, p. 105.

12. **ex lege Cornelia**: cf. note on *Slavery*, p. 84.

16. **iuxta tabulas bonorum possessionem dat**: a will which lacked some of the formalities required by the civil law will made *per aes et libram* came to be upheld by the praetor if it were a written document produced with the unbroken seals of seven witnesses. The praetorian law developed a new form of will, of which the essential requirements were the *tabulae* closed by the seals of seven witnesses. Instead of a defective mancipatory will becoming null *ab initio* because of non-observance of form, the praetor used his power of granting the written heir possession, *i.e.* possession according to the provisions of the will (*iuxta vel secundum tabulas*), unless a civil law heir *ab intestato* claimed the inheritance. The

sionem dat, si testator et civis Romanus et suae potestatis cum moreretur fuit; quam bonorum possessionem cum re, id est cum effectu habent, si nemo alius iure heres sit.

Gai. 2, 144 Posteriore quoque testamento quod iure factum est superius rumpitur.

Gai. 2, 229 Ante heredis institutionem inutiliter legatur, scilicet quia testamenta vim ex institutione heredis accipiunt, et ob id velut caput et fundamentum intellegitur totius testamenti heredis institutio.

Gai. 2, 116 Ante omnia requirendum est, an institutio heredis sollemni more facta sit; nam aliter facta institutione nihil proficit familiam testatoris ita venire testesque ita adhibere et ita nuncupare testamentum. Sol-

praetor could not make one an heir, but he could put one in possession of the property (*bonorum possessor*). For *bonorum possessio* see below, note on *bonorum*, p. 287. The procedure of making a will *per aes et libram* became a mere form. The praetor made use of all that was really essential, namely, the written tablets attested by the seals of seven witnesses. For the union of the civil and praetorian forms in imperial law see below, note on *bonorum*, p. 287.

2. **bonorum possessionem cum re**: for the meaning of *cum re* and *sine re* see below, text, p. 291, Ulp. 28, 13. The persons whom the praetor protected were not heirs, because the testament was invalidated, but they were in the position of heirs (*bonorum possessores heredis loco*), so long as legal heirs (*heredes legitimi*) did not come forward, as effectually (*cum effectu*) as if they were heirs under the will (*heredes testamentarii*).

6. **inutiliter legatur**: the primary object of a Roman will was the appointment of an heir. This was the essential thing, and a will could not exist without such an *institutio*, although it might be valid without other dispositions. A will, therefore, might consist of three words only, when there was no disinherison and no legacy, '*Titius heres esto*.' So essential was the appointment of the heir that all legacies written before it were void. In the earlier law the appointment must be in the form of a command (*verba imperativa*), but later, other forms of expression were accepted.

lemnis autem institutio haec est 'Titius heres esto'; sed et illa iam conprobata videtur 'Titium heredem esse iubeo'; at illa non est conprobata 'Titium heredem esse volo'; sed et illae a plerisque inprobatae sunt 'Titium heredem instituo,' item 'heredem facio.'

Ulp. 22, 1

Heredes institui possunt, qui testamenti factionem cum testatore habent. Dediticiorum numero heres institui non potest, quia peregrinus est, cum quo testamenti factio non est. Latinus Iunianus si quidem mortis testatoris tempore vel intra diem cretionis civis Romanus sit, heres esse potest; quod si Latinus manserit, lege Iunia capere hereditatem prohibetur. Idem iuris est

6. **Heredes institui possunt**: it was required that the heir appointed in a will should have *testamenti factio cum testatore* when the will was executed, when he was called to the inheritance (*delatio*), and from this time until he was vested with it (*aditio*). No account was made of the intervening time (*media tempora non nocent*). Capacity to be instituted heir (*testamenti factio passiva*) was less restricted than capacity to execute a will, just as more requirements must be satisfied for disposing of property than for receiving it. Some persons, however, who were qualified to be written as heirs or legatees could not take their inheritances or legacies, being incapable (*incapaces*, 'non-takers') of acquisition by special laws, *e.g. caelibes*, *orbi*, *Latini Iuniani*. For *lex Iunia* see note on *Libertorum*, p. 89.

10. **intra diem cretionis**: as will be seen below, in case of certain kinds of heirs, called 'heirs by necessity' (*heredes necessarii*) no acceptance of the inheritance (*aditio*) was required. At the moment of the testator's death, the *necessarii* became heirs *ipso iure*, the choice of accepting or declining the inheritance being denied them. In the case of other heirs, however (*extranei, voluntarii heredes*), the will usually stated the time to be allowed for deliberation (*cretio*, *cernere*, *to decide*), the ordinary period being one hundred days (*spatium deliberandi*). For failure to accept within the prescribed time, the heirs were set aside. When the will contained no *cretio*, the heir used as much time to decide as he desired, unless limited by the praetor. See also note on *cum cretione*, p. 283.

in persona caelibis propter legem Iuliam. Incerta persona heres institui non potest, velut hoc modo: 'Quisquis primus ad funus meum venerit, heres esto,' quoniam certum consilium debet esse testantis. Nec municipia nec municipes heredes institui possunt, quoniam incertum corpus est, et

1. **in persona caelibis**: by the *lex Iulia et Papia Poppaea* (under Augustus) — two statutes, owing to the similarity of their purpose in regulating marriage, commonly treated as one — *caelibes* were rendered totally incapable of taking an inheritance or a legacy, unless married within one hundred days from the testator's death, and *orbi* (childless married people) could take only the half. This disability did not apply to blood relations of the testator within the sixth degree. A *caelebs* was a man between twenty-five and sixty, or a woman between twenty and fifty, who had never been married, and a widower or a widow. Women were allowed two years from the death of their husbands and eighteen months from the time of their divorce in which to remarry. All these rules penalizing celibacy and childlessness were abolished by the sons of Constantine, and the *lex Iulia et Papia Poppaea* was entirely abrogated by Justinian. — **Incerta persona heres institui non potest**: an *incerta persona* is defined by Gai. 2, 238, *incerta videtur persona, quam per incertam opinionem animo suo testator subicit*. Persons of whom the testator has no clear conception as individuals, because they are not yet born or because they are ascertainable only after the execution of his will, cannot be appointed heirs. Exception was made in the early law in favor of the testator's own posthumous children (*postumi sui*). Later the jurisprudence, under the leadership of the jurist Aquilius Gallus, contemporary of Cicero, extended this privilege to posthumous grandchildren, if they became *sui heredes* of their grandfather by the latter's surviving their own father. Further, a *lex Vellaea*, of the early empire, provided that *sui heredes* born in the lifetime of the testator but after the execution of his will were to be considered *postumi sui* and as having *testamenti factio cum testatore*. A *postumus alienus* was still an *incerta persona* (*e.g.* a grandson conceived after a son's emancipation) by the ius civile, but Justinian allowed all posthumous children to be made heir, and removed most of the restrictions placed on *incertae personae*, natural and artificial.

4. **Nec municipia nec municipes**: the capacity of corporations to be heir was, however, partially recog-

neque cernere universi neque pro herede gerere possunt, ut heredes fiant. Senatus consulto tamen concessum est, ut a libertis suis heredes institui possint. Sed fidei commissa hereditas municipibus restitui potest, denique hoc senatus consulto prospectum est. Deos heredes instituere non possumus praeter eos, quos senatus consulto constitutionibusve principum instituere concessum est. Servos heredes instituere possumus, nostros cum libertate, alienos sine libertate, communes cum libertate vel sine libertate. Eum servum, qui tantum in bonis noster est, nec cum libertate heredem instituere possumus, quia Latinitatem consequitur, quod non proficit ad hereditatem capiendam. Alienos servos heredes instituere possumus eos tantum, quorum cum dominis testamenti factionem habemus. Communis servus cum libertate recte quidem heres instituitur quasi proprius pro parte nostra; sine libertate autem quasi alienus propter socii partem. Proprius servus cum libertate heres institutus si quidem in eadem causa permanserit, ex testamento liber et heres fit, id est necessarius.

nized earlier than Justinian, in the fact that municipalities could be made heirs of their freedmen. The Roman People, as a State, could at all times be heir. Leo (469 A.D.) permitted the appointment of cities.

3. **fidei commissa hereditas**: cf. note on *qui de*, p. 61.

7. **Servos heredes instituere possumus**: the chief requirement of *testamenti factio passiva* was *commercium*. This, of course, slaves did not possess, but those of the testator could be made heirs, in which case they received their liberty as a matter of course (*praesumptio libertatis*, cf. notes on *heres*, p. 97, and *neminem*, p. 98); slaves of other persons could accept an heirship with their masters' permission and their masters accordingly acquired the inheritance as if *they* had been appointed heirs.

10. **tantum in bonis est**: *i.e.* is not our property by the *ius civile*, but is only in our possession. Cf. notes on *in bonis*, p. 185, and *bonorum possessionem*, p. 287, and text.

18. **in eadem causa**: *i.e.* if not set free in the master's lifetime.

Inst. 2, 14, 4

Et unum hominem et plures in infinitum, quot quis velit, heredes facere licet. Hereditas plerumque dividitur in duodecim uncias, quae assis appellatione continentur. Habent autem et hae partes propria nomina ab uncia usque ad assem, ut puta haec: sextans, quadrans, triens, quincunx, semis, septunx, bes, dodrans dextans, deunx, as. Non autem utique duodecim uncias esse oportet. Nam tot unciae assem efficiunt, quot testator voluerit, et si unum tantum quis ex semisse verbi gratia heredem scripserit, totus as in semisse erit; neque enim idem ex parte testatus et ex parte intestatus decedere potest, nisi sit miles. Heres et pure et sub condicione

Otherwise the slave might accept the inheritance or refuse it. For *heres necessarius* see note on *heres*, p. 97, and on *Heredes*, p 282.

2. **Hereditas dividitur in duodecim uncias**: an inheritance might be divided among several joint heirs (*coheredes*) equally (*per capita*) or in fractional shares. The latter was the usual way, the division being made according to the Roman duodecimal system, of which the unit was the *as*, normally composed of 12 *unciae* (as in their weights and currency). The inheritance, as a unit, *might* be considered as composed of more or less than 12 fractions of the *as*. If the number of shares bequeathed should amount to more than 12, the *unciae* represent the proper fraction of the unit, *e.g.* one-fifteenth, the inheritance representing an *as* composed of 15 *unciae*; if less than 12, the excess is distributed among the heirs *pro rata*. The names of the fractions are: *uncia* ($\frac{1}{12}$), *sextans* ($\frac{1}{6}$), *quadrans* ($\frac{1}{4}$), *triens* ($\frac{1}{3}$), *quincunx* ($\frac{5}{12}$), *semis* ($\frac{1}{2}$), *septunx* ($\frac{7}{12}$), *bes* ($\frac{8}{12}$), *dodrans* ($\frac{9}{12}$), *dextans* ($\frac{10}{12}$), *deunx* ($\frac{11}{12}$). A *heres ex asse* is, therefore, heir to the whole estate. Cf. Juv. 1, 40, *unciolam Proculeius habet, sed Gillo deuncem*.

10. **totus as in semisse**: *i.e.* the whole *as* (the inheritance as a unit) will be considered as composed of six parts, but if there were joint heirs, the heir *ex semisse* would be entitled to take half.

12. **nisi sit miles**: see note on *Militibus*, p. 269. — **sub condicione institui potest**: but the condition must be a possible one, otherwise the heir takes the inheritance at once, as if the condition were not there (*pro non scripto*).

institui potest. Ex certo tempore aut ad certum tempus non potest, veluti 'post quinquennium quam moriar' vel 'ex kalendis illis' aut 'usque ad kalendas illas heres esto'; diemque adiectum pro supervacuo haberi placet et perinde esse, ac si pure heres institutus esset.

Ulp. D. 29, 1, 15, 4

Miles et ad tempus heredem facere potest et alium post tempus vel ex condicione vel in condicionem. Item tam sibi quam filio iure militari testamentum facere potest, et soli filio, tametsi sibi non fecerit; quod testamentum valebit, si forte pater vel in militia vel intra annum militiae decessit.

Inst. 2, 15

Potest autem quis in testamento suo plures gradus heredum facere, ut puta 'si ille heres non erit, ille heres esto'; et deinceps, in quantum velit, testator substituere potest et novissimo loco in subsidium vel servum necessarium heredem instituere. Et plures in unius locum possunt substitui, vel unus in plurium, vel singuli singulis, vel invicem ipsi, qui heredes instituti sunt.

Gai. 2, 179

Liberis nostris impuberibus, quos in potestate habemus, non solum ita ut supra diximus sub-

12. **plures gradus heredum**: as a provision against the possibility of dying intestate through the failure of an heir, the Roman law allowed the conditional appointment of persons to become heirs in case the appointed heir should fail to take the inheritance, *e.g.* because of death in the testator's lifetime, or of refusal, or of loss of capacity to be heir. Except for the provisional appointment of substitutes, the will would become ineffectual (*testamentum irritum, destitutum*). The degree to which substitutes could be appointed was unlimited. The possibility of the will failing because none of the voluntary heirs (*vel instituti vel substituti*) chose to accept was often met (especially by insolvent testators) by appointing slaves at the end of the series of substitutes (*heres necessarius*, cf. note on *heres*, p. 97 and below, note on *Heredes*, p. 282). This is the ordinary kind of substitution (*substitutio vulgaris*).

19. Liberis nostris impuberibus:

stituere possumus, id est ut si heredes non extiterint, alius nobis heres sit; sed eo amplius ut, etiamsi heredes nobis extiterint et adhuc inpuberes mortui fuerint, sit iis aliquis heres; velut hoc modo 'Titius filius meus mihi heres esto. Si filius meus mihi heres non erit sive heres erit et prius moriatur quam in suam tutelam venerit, tunc Seius heres esto.' Quo casu siquidem non extiterit heres filius, substitutus patri fit heres; si vero heres extiterit filius et ante pubertatem decesserit, ipsi filio fit heres substitutus. Quam ob rem duo quodammodo sunt testamenta, aliud patris, aliud filii, tamquam si ipse filius sibi heredem instituisset; aut certe unum est testamentum duarum hereditatum.

Inst. 2, 13, pr. Qui filium in potestate habet, curare debet, ut eum heredem instituat vel exheredem nominatim faciat; alioquin si eum silentio praeterierit, inutiliter

since a Roman citizen had no active testamentary capacity until the age of puberty, it might happen that children surviving their father should themselves die while in pupilage, *i.e.* before they had capacity to make a will and so die intestate. To meet this difficulty, the law allowed a father in making his will to appoint provisional heirs for his surviving children, should they die *intra pubertatem*. This is the so-called pupillary substitution (*substitutio pupillaris*). These substitutions were ineffectual as soon as the *pupilli* became *puberes*.

1. **si heredes non extiterint**: *i.e.* substitutions could be made for children in the testator's power in the event of their not becoming heirs for any reason such as non-acceptance or predecease, but the substitutes would be the heir of the testator, not of the children. A will making a pupillary substitution was peculiar in that it dealt with two inheritances, that of the testator and that of his son (*duo quodammodo testamenta*).

14. **ut eum heredem instituat**: a father must notice *sui heredes* in his will either by their appointment as heirs or by their disinherison. Passing over them in silence was not only insufficient for their disinherison, but in the case of sons was fatal to the will. In other words, certain heirs had such strong natural claims upon the inheritance because of their close relationship to the testator,

testabitur, adeo quidem ut, etsi vivo patre filius mortuus sit, nemo ex eo testamento heres existere possit, quia scilicet ab initio non constiterit testamentum. Sed non ita de filiabus vel aliis per virilem sexum descendentibus liberis utriusque sexus fuerat antiquitati observatum; sed si non fuerant heredes scripti scriptaeve vel exhereditati exhereditataeve, testamentum quidem non infirmabatur, ius autem adcrescendi eis ad certam portionem praestabatur. Sed

that the latter's intention to defeat these claims must be formally expressed. The origin and early history of this principle (*exheredatio*) are in considérable doubt, and various explanations have been given. In primitive law there was no will. The *sui*, as co-owners of the family property, at the death of their *paterfamilias*, came into full control *ipso iure*. They were in the household; they could not be set aside. Later on, even in the presence of a will, they were entitled to the inheritance, and the will was probably invalid. In the Twelve Tables, the testator had unrestricted testamentary power (*uti legassit super pecunia tutelave suae rei, ita ius esto*) and contrary to the former customary law, this was interpreted to mean that even *sui heredes* might be disinherited in favor of a stranger (*extraneus*); and so the principle gained recognition before the time of Cicero that *sui heredes* (*postumi* as well as *nati*) must be appointed or disinherited in express terms (*heredes sui vel instituendi sunt vel exheredandi*). — **nominatim**: not necessarily by name (for this would be impossible in case of *postumi*), but by express statement, while others than *filii* could be disinherited in a general statement, which was often added after the appointment of heir ('*ceteri omnes exheredes sunto*'). Justinian required the same formal disinherison of all *sui*.

7. **ius adcrescendi**: passing over a *filius* rendered the will void, whereas passing over other *sui* (*ceteri*) did not invalidate the will, but those passed over (*praeteriti*) were entitled to certain portions. If the appointee were an outsider (*extraneus*), the *praeteriti* took one half of the inheritance: if *sui*, the *sui praeteriti* took equal shares (*portio virilis*) with the appointed heirs, *i.e. per capita* (*reliquae vero personae liberorum, velut filia nepos neptis, si praeteritae sint, valet testamentum, sed scriptis heredibus adcrescunt, suis quidem heredibus in partem virilem, extraneis autem in partem dimidiam*).

nec nominatim eas personas exheredare parentibus necesse erat, sed licebat et inter ceteros hoc facere. Nominatim autem exheredari quis videtur, sive ita exheredetur 'Titius filius meus exheres esto,' sive ita 'filius meus exheres esto' non adiecto proprio nomine, scilicet si alius filius non extet. Postumi quoque liberi vel heredes institui debent vel exheredari. Et in eo par omnium condicio est, quod et in filio postumo et in quolibet ex ceteris liberis sive feminini sexus sive masculini praeterito valet quidem testamentum, sed postea adgnatione postumi sive postumae rumpitur et ea ratione totum infirmatur.

Emancipatos liberos iure civili neque heredes instituere neque exheredare necesse est, quia non sunt sui heredes. Sed praetor omnes tam feminini quam masculini sexus, si heredes non instituantur, exheredari iubet, virilis sexus nominatim, feminini vero et inter ceteros. Quodsi neque heredes instituti fuerint neque ita ut diximus exheredati, promittit praetor eis contra tabulas testamenti bonorum possessionem.

Inst. 2, 18

Quia plerumque parentes sine causa liberos suos vel exheredant vel omittunt, inductum est, ut de inofficioso testamento agere possint liberi, qui quc-

This distinction was set aside by Justinian.

10. **adgnatione postumi**: see note on *postumi*, p. 146.

12. **Emancipatos liberos**: the praetor, recognizing the tie of blood, extended the principle of disinherison to emancipated children.

22. **de inofficioso testamento**: as was seen above, it was not only the duty of the testator to notice certain natural heirs, by appointing them or by disinheriting them, but it was further required that they should be disinherited for cause, and passing over them in silence or disinheriting them in express terms, leaving the inheritance to strangers, opened the will to attack on the ground that it was 'undutiful' (*in-officiosum*) or contrary to the *officium pietatis*, *i.e.* the natural affection of a parent toward his children. Toward the

runtur, aut inique se exheredatos aut inique praeteritos, hoc colore, quasi non sanae mentis fuerunt, cum testamentum ordinarent. Sed hoc dicitur, non quasi vere furiosus sit, sed recte quidem fecit testamentum, non autem ex officio pietatis; nam si vere furiosus est, nullum est testamentum.

Marc. D. 5, 2, 3

Inofficiosum testamentum dicere hoc est: allegare, quare exheredari vel praeteriri non debuerit; quod plerumque accidit, cum falso parentes instimulati liberos suos vel exheredant vel praetereunt. Huius autem verbi 'de officioso' vis illa ut dixi est docere immerentem se et ideo indigne praeteritum vel etiam exheredatione summotum, resque illo colore defenditur apud iudicem, ut videatur ille quasi non sanae mentis fuisse, cum testamentum inique ordinaret.

Inst. 2, 18, 1

Non tantum autem liberis permissum est parentum testamentum inofficiosum accusare,

end of the republic, the Centumviral court, which presided over all controversies regarding inheritance, admitted a formal complaint by which the validity of such a will was tested (*querela inofficiosi testamenti*). Since, however, such a will was not void but only voidable, if it appeared that natural heirs had been disinherited without sufficient cause, the practice of the court allowed a fictitious allegation that an undutiful will, being contrary to natural feeling, was the work of a testator unsound in mind (*hoc colore, quasi non sanae mentis*) and as such should be set aside. The estate was then opened to the legal heirs (*ab intestato*).

9. **falso parentes instimulati**: originally the question of deciding what grounds were sufficient to justify the disinheritance of natural heirs was left entirely to the discretion of the court. There was no statute providing for relief in case of an undutiful will. The institution grew out of the practice of the Centumviral court, which was based on moral grounds rather than on law. Justinian determined the question with more certainty by naming fourteen grounds for disinheriting a child, and he required that the testator state in

verum etiam parentibus liberorum. Soror autem et frater turpibus personis scriptis heredibus ex sacris constitutionibus praelati sunt; non ergo contra omnes heredes agere possunt. Vltra fratres et sorores cognati nullo modo aut agere possunt aut agentes vincere. Igitur quartam quis debet habere, ut de inofficioso testamento agere non possit.

Gai. 2, 152

Heredes autem aut necessarii dicuntur aut sui et necessarii aut extranei. Necessarius heres est servus cum libertate heres institutus, ideo sic appellatus,

his will the reason in each case for the disinherison.

1. **parentibus liberorum**: the law of Justinian allowed a parent to attack the will of a child as 'undutiful' if the latter had no children, and required that the child should state the reason for his conduct. Of collaterals, brothers and sisters only could enter the plea (*querela*), if there were no children or parents, and if infamous persons (*persona turpis*) were appointed over them. This remedy was not open to those to whom the law offered any other relief in the case, and it was denied those who had acknowledged the validity of the will by accepting anything under it.

5. **Igitur quartam** (sc. *portionem*): the amount that one should receive who had been disinherited by an undutiful will was originally left to the discretion of the judge. Later on, after the analogy of the *lex Falcidia* (a *plebiscitum*, 40 B.C., providing that every testamentary heir should be left one fourth of the inheritance, free from legacies), it became an established rule that every child was entitled to at least one fourth of his share by intestacy (*quarta legitima*, *portio legitima*).

8. **Heredes necessarii**: by the civil law, there were, in the broadest sense, two kinds of heirs, those that inherit *inviti* (*heredes domestici*, *i.e.* members of the deceased's household), and *voluntarii* (*heredes extranei*, *i.e.* outsiders). The former became heirs at once, by operation of law, after the death of their predecessor. They were heirs by necessity. The latter became heirs only by an act of entry (*aditio hereditatis*) showing their intention to accept the office. They were, therefore, heirs by choice or voluntary heirs. In the ancient *ius civile*, there was no difference in the matter of necessary heirship between *necessarii* (slaves) and *sui et necessarii* (per-

quia sive velit sive nolit, omni modo post mortem testatoris protinus liber et heres est. Vnde qui facultates suas suspectas habet, solet servum suum primo aut secundo vel etiam ulteriore gradu liberum et heredem instituere, ut si creditoribus satis non fiat, potius huius heredis quam ipsius testatoris bona veneant, id est ut ignominia, quae accidit ex venditione bonorum, hunc potius heredem quam ipsum testatorem contingat.

Ulp. 22, 24

Inter necessarios heredes, id est servos cum libertate heredes scriptos, et suos et necessarios, id est liberos qui in potestate sunt, iure civili nihil interest; nam utrique etiam inviti heredes sunt. Sed iure praetorio suis et necessariis heredibus abstinere se a parentis hereditate permittitur, necessariis autem tantum heredibus abstinendi potestas non datur. Extraneus heres, si quidem cum cretione sit heres institutus, cernendo fit heres; si vero sine cretione, pro herede gerendo. Pro herede gerit

sons under the *potestas*, *manus*, or *mancipium* of deceased). Both alike were bound to take the inheritance with its debts, as well as its benefits. But the equity of the praetor relieved the *sui* from the burden of an insolvent inheritance (*hereditas damnosa*) by extending to them the privilege of 'holding off' from it (*beneficium abstinendi*), so that if they elected to refuse, they were relieved of any financial risks connected with the inheritance. The slave (*necessarius*) received his compensation for the forced acceptance of an insolvent estate in the grant of freedom (*manumissio testamento*, see notes on *heres solus*, p. 97, and *ne*, p. 98).

3. primo aut secundo vel ulteriore gradu: see note on *plures gradus*, p. 277.

16. cum cretione: the voluntary heir to be properly vested with the inheritance must have made either a *formal declaration* of his intention to accept or else he must have given some *informal* expression of his intention. The former was called *cretio*, the latter, *pro herede gestio*. The *sui et necessarii heredes* lost the praetorian benefit of abstention by any informal act of interference with the inheritance (*immixtio*).

qui rebus hereditariis tamquam dominus utitur, velut qui auctionem rerum hereditariarum facit aut servis hereditariis cibaria dat. Cretio est certorum dierum spatium, quod datur instituto heredi ad deliberandum, utrum expediat ei adire hereditatem nec ne, velut 'Titius heres esto cernitoque in diebus centum proximis, quibus scieris poterisque; nisi ita creveris, exheres esto.' Cernere est verba cretionis dicere ad hunc modum: 'quod me Maevius heredem instituit, eam hereditatem adeo cernoque.'

Inst. 3, 1

Intestatus decedit, qui aut omnino testamentum non fecit aut non iure fecit aut id quod fecerat ruptum irritumve factum est aut nemo ex eo heres extitit.

3. **certorum dierum spatium**: the testator usually fixed in his will the period allowed for the heir to deliberate on the acceptance of the inheritance. The usual time was one hundred days. In the absence of a predetermined period, the praetor was often requested by the creditors of the estate to fix a period within which the heirs must accept or refuse, according to the demands of their interests (*beneficium deliberandi*). Justinian required that it should not exceed one year.

10. **Intestatus**: if a Roman citizen died without making a will, or his will was void or became ineffectual for any of the reasons stated above (see note on *Testamentum*, p. 270), the succession to his inheritance was regulated by the operation of law. The heirs were, therefore, called *heredes legitimi* and the inheritance, *hereditas legitima* (or *ab intestato*) in distinction from *heredes testamentarii* (or *ex testamento*). In the absence of a valid will, the members of an intestate's family were called to the heirship. Who the heirs were would depend upon the conception of the Roman family (cf. note on *Agnatic*, p. 107). This conception changed very much in the time from the Twelve Tables to Justinian's death. From the agnatic principle of the *ius civile*, which depends entirely upon *potestas*, to the recognition of the cognates (relationship by blood) by the praetor and imperial legislation, the rules of intestate succession became materially altered. Three periods must be borne in mind in the law of intestacy: that of the Twelve Tables

Ulp. 26, 1

Intestatorum ingenuorum hereditates pertinent primum ad suos heredes, id est liberos qui in potestate sunt ceterosque qui liberorum loco sunt; si sui heredes non sunt, ad consanguineos, id est fratres et sorores ex eodem patre; si nec hi sunt, ad reliquos agnatos proximos,

(*ius civile*), the system of the praetor (*bonorum possessio*), and the system of Justinian (a union of the *ius civile* and *bonorum possessio*).

1. **Intestatorum ingenuorum hereditates**: the law distinguishes between the devolution of the estates of freedmen and freemen. The former, though possessing the private rights of freemen, nevertheless remained under certain obligations to their patrons, and this appeared in the course which the property of intestate freedmen took (noticed below, note on *Libertorum*, p. 287).

2. **primum ad suos heredes**: the law of intestate succession is based on the principle of collective, family ownership of their common property. The ownership of this family property was not materially affected when it passed from the control of the father to his coproprietors, his children, who were members of his own household. The Twelve Tables indicated three groups of persons to be called successively to the estate of an intestate, *i.e. sui heredes*, *agnati*, and *gentiles*. The *sui* were those in the *potestas* of the deceased, who became *sui iuris* by his death (see below). This includes more than his own children; it includes his family on the agnatic basis of composition, *i.e.* his children, his wife *in manu*, his grandchildren begotten by a son predeceased or emancipated (but born before the emancipation occurred) and adopted children. The *sui* continue the family ownership. The inheritance is vested in them directly, even without their knowledge or consent. Those of the same degree took equal shares, being counted by heads (*per capita*); those of the second degree, in conjunction with heirs of the first degree (*i.e.* grandchildren and children respectively), took the share of their immediate ascendant, if dead, and this share was divided among them counted by stocks (*per stirpes*). Cf. note on *in stirpes*, p. 287.

4. **ad consanguineos**: *consanguinei sunt eodem patre nati, licet diversis matribus, qui in potestate fuerunt mortis tempore: adoptivus quoque frater*, Paul. 4, 8, 15. In default of *sui heredes*, the Twelve Tables called in the second place the collateral agnates of the degree nearest to the deceased (*agnati proximi*). Several agnates of the same degree took

id est cognatos virilis sexus per mares descendentes eiusdem familiae. Id enim cautum est lege duodecim tabularum hac: 'si intestato moritur, cui suus heres nec escit, agnatus proximus familiam habeto.' Si agnatus defuncti non sit, eadem lex duodecim tabularum gentiles ad hereditatem vocat.

Gai. 3, 11

Non tamen omnibus simul agnatis dat lex duodecim tabularum hereditatem, sed his qui tum, cum certum est aliquem intestatum decessisse, proximo gradu sunt. Nec in eo iure successio est. Ideoque si agnatus proximus hereditatem omiserit vel antequam adierit decesserit, sequentibus nihil iuris ex lege conpetit.

equal portions (*per capita*). Those of the nearest degree (brothers and sisters) took alike without distinction of sex, while remoter degrees were represented only by males. Agnates were voluntary heirs. They might, therefore, refuse the inheritance, but in this case there was no succession open to the next degree, or to remoter degrees (*nec in eo iure successio est*). The law called none but the nearest agnate living at the death of the intestate. If he did not become heir, the offer of the inheritance passed at once to the *gentiles*. Just how the *gens* succeeded, whether as individual families, as a corporation, or otherwise, is not known. The gentile succession was obsolete in the time of Gaius.

1. **cognatos virilis sexus**: by interpretation of the *lex Voconia* (169 B.C.), which imposed restrictions on women in the law of succession (as heirs and legatees), the jurists introduced the principle that beyond brothers and sisters agnates of the male sex alone could be heirs, *i.e.* that women should be restricted to the *consanguineae*. The *lex Voconia* having disqualified women in testamentary succession, the lawyers held by analogy that they should be under a similar disability in intestate succession (*feminae ad hereditates legitimas ultra consanguineas successiones non admittuntur: idque iure civili Voconiana ratione videtur effectum. Ceterum lex duodecim tabularum nulla discretione sexus cognatos admittit*, Paul. 4, 8, 20).

12. **sequentibus**: *e.g.* to the son of the *proximus agnatus*, as a 'nearer (sometimes technically called *proximior*) *proximus*.' Cf. note on *proximior*, p. 170.

Ulp. 26, 2

Si defuncti sit filius, et ex altero filio mortuo iam nepos unus vel etiam plures, ad omnes hereditas pertinet, non ut in capita dividatur, sed in stirpes, id est ut filius solus mediam partem habeat et nepotes quotquot sunt alteram dimidiam; aequum est enim nepotes in patris sui locum succedere et eam partem habere, quam pater eorum, si viveret, habiturus esset.

Ulp. 27, 1

Libertorum intestatorum hereditas primum ad suos heredes pertinet, deinde ad eos, quorum liberti sunt, velut patronum patronam liberosve patroni.

Ulp. 26, 7

Ad liberos matris intestatae hereditas ex lege duodecim tabularum non pertinebat, quia feminae suos heredes non habent; sed postea imperatorum Antonini et Commodi oratione in senatu recitata id actum est, ut sine in manum conventione matrum legitimae hereditates ad filios pertineant, exclusis consanguineis et reliquis agnatis. Intestati filii hereditas ad matrem ex lege duodecim tabularum non pertinet; sed si ius liberorum habeat, ingenua trium, libertina quattuor, legitima heres fit ex senatus consulto Tertulliano, si tamen ei filio neque suus heres sit quive inter suos heredes ad bonorum possessionem a praetore vocatur, neque pater, ad quem lege here-

3. **in stirpes**: *i.e.* they became heirs 'by representation,' all the grandchildren together representing their own father took his share, in this case, the half.

8. **Libertorum intestatorum hereditas**: the inheritance of a freedman was by the Twelve Tables offered to his *sui heredes*; in default of these, to his patron, and then to the latter's agnatic descendants, and finally, to their *gens*. But the estate of a *Latinus Iunianus* passed at once to his patron and the latter's heirs in the nature of a *peculium* (see note on *Libertorum*, p. 89).

21. **bonorum possessionem**: along with the civil inheritance of the *ius civile*, the praetor developed, during the republic, an entirely new system of succession. Certain

ditas bonorumve possessio cum re pertinet, neque frater consanguineus; quod si soror consanguinea sit, ad utrasque pertinere iubetur hereditas.

Ulp. D. 37, 1, 3, 2

Bonorum igitur possessionem ita recte definiemus ius persequendi retinendique patrimonii sive rei, quae cuiusque cum moritur fuit.

Inst. 3, 9

Ius bonorum possessionis introductum est a praetore emendandi veteris iuris gratia. Nec solum in intestatorum hereditatibus vetus ius eo modo

persons, according to rules published in the edict, were given an interest in the estate of a deceased person. These persons were protected in their enjoyment of the estate by praetorian interference, on the ground that they were the best entitled to the possession of the estate. By the civil law, only those who were strictly *heredes* (as defined by law) were called to an inheritance. By the praetorian law, those persons were put in possession whom the praetor by a natural sense of equity (*ex aequo et bono*) considered as best entitled to the succession. The praetorian successor was called *bonorum possessor*, the system, *bonorum possessio*, just as the civil successor was called *heres*, the inheritance, *hereditas*. These two systems existed for a long time side by side, the *hereditas* devolving by an act of law (*iure civili*), the *bonorum possessio* being obtained only by application to a magistrate (*iure honorario*), but the praetorian system was modified by decrees of the senate and imperial enactments until the two were finally merged into one system by Justinian.

5. ius persequendi: 'the right to pursue and to keep the entire property or any single thing which belonged to a person at the time of death.' *Bona* in this connection means more than corporeal property, goods having a physical existence; here it is synonymous with *hereditas*, including the entire estate, with its rights and liabilities, even though lacking corporeal property (*sive damnum habent sive lucrum, sive in corporibus sunt sive in actionibus, in hoc loco proprie bona appellabuntur. Denique etsi nihil corporale est in hereditate, attamen recte eius bonorum possessionem adgnitam Labeo ait*, D. 37, 1, 3).

7. introductum est a praetore: the origin of the praetor's interference in inheritance is still much in dispute. It is probable that the

praetor emandavit, sicut supra dictum est, sed in eorum quoque, qui testamento facto decesserint. Nam si alienus postumus heres fuerit institutus, quamvis hereditatem iure civili adire non poterat, cum institutio non valebat, honorario tamen iure bonorum possessor efficiebatur, videlicet cum a praetore adiuvabatur; sed et hic e nostra constitutione hodie recte heres instituitur, quasi et iure civili non incognitus. Aliquando tamen neque emendandi neque impugnandi veteris iuris, sed magis confirmandi gratia pollicetur bonorum possessionem. Adhuc autem et alios complures gradus praetor fecit in bonorum possessionibus dandis, dum id agebat, ne quis sine successore moriatur; nam angustissimis finibus constitutum per legem duodecim tabularum ius percipiendarum hereditatum praetor ex bono et aequo dilatavit.

Ulp. D. 38, 9, 1 Successorium edictum idcirco propositum est, ne bona hereditaria vacua sine domino diutius iacerent et creditoribus longior mora fieret.

praetor afforded temporary relief at first in each individual case after judicial inquiry (*causa cognita*) by issuing a special decree determining the succession (*bonorum possessio decretalis*). Afterward the order of succession was regularly published in the standing edict (*bonorum possessio edictalis*). The purpose of the praetor in granting a *bonorum possessio* was threefold: *adiuvandi*, *supplendi*, *corrigendi iuris civilis gratia*, *i.e.* by applying the ancient *ius civile* in a more equitable manner by recognizing more fully the claims of blood relationship (*confirmandi gratia*); by supplementing the old law of the Twelve Tables, to prevent intestacy (*emendandi gratia*); by setting aside some old rules as inequitable (*impugnandi gratia*). In no case, however, did the praetor do more than to allow the possessor to have the succession *in bonis* (see note on *in bonis*, p. 185) until his title was ripened by *usucapio*. In the early law, continuous possession of an inheritance for one year by any outside party (before the heir has entered upon it) gave a title by usucapion. Some have held this to be the origin of *bonorum possessio* (*ne bona hereditaria vacua sine domino diutius iacerent*).

15. **edictum propositum**: the praetor stated in his edict that he

Ulp. 28, 10 Bonorum possessio datur parentibus et liberis intra annum, ex quo petere potuerunt, ceteris intra centum dies. Qui omnes intra id tempus si non petierint bonorum possessionem, sequens gradus admittitur, perinde atque si superiores non essent; idque per septem gradus fit.

Paul. D. 37, 1, 6, 1 Bonorum possessionis beneficium multiplex est: nam quaedam bonorum possessiones competunt contra voluntatem, quaedam secundum voluntatem defunctorum, nec non ab intestato habentibus ius legitimum vel non habentibus propter capitis deminutionem.

would grant an interdict in favor of the *bonorum possessor* to enable him to recover the estate of the deceased. This interdict or magisterial order, called from its initial words 'quorum bonorum,' ran as follows: *Ait praetor*, '*quorum bonorum ex edicto meo illi possessio data est, quod de his bonis pro herede aut pro possessore possides possidereve, si nihil usucaptum esset, quod quidem dolo malo fecisti, uti desineres possidere, id illi restituas*.' This enabled the *bonorum possessor* to recover corporeal things; for debts he could sue and be sued by fictitious actions in which he was assumed to be the heir (*actiones ficticiae*). *In omnibus vice heredum bonorum possessores habentur*, D. 37, 1, 2.

2. **intra annum**: as the acquisition of succession by *bonorum possessio* was voluntary, the proper persons must make demand for their succession before the praetor within the prescribed time. For parents and children (*i.e.* ascendants and descendants), this was one year, corresponding to the period required for usucapion of an inheritance; and for others, a period of one hundred days, corresponding to the time of *cretio*. In both cases, time was reckoned *utiliter*, cf. note on *intra*, p. 241.

7. **beneficium multiplex est**: the *delatio* or offer of *bonorum possessio* (like *hereditas*) is based upon a will or it may arise *ab intestato*. In the former case it may be given *contra tabulas* (*contra voluntatem*), *i.e.* the praetor set the will aside as inequitable and admitted children who had been passed over in their father's will, *e.g.* emancipated descendants; or it may be *secundum tabulas* (*secundum voluntatem*), the praetor upholding a will which lacked some requirements of the civil law and was legally invalid. In *bonorum*

Inst. 3, 9, 2

Quos autem praetor solus vocat ad hereditatem, heredes quidem ipso iure non fiunt (nam praetor heredem facere non potest; per legem enim tantum vel similem iuris constitutionem heredes fiunt, veluti per senatus consultum et constitutiones principales); sed cum eis praetor dat bonorum possessionem, loco heredum constituuntur et vocantur bonorum possessores.

Ulp. 28, 13

Bonorum possessio aut cum re datur aut sine re: cum re, cum is qui accepit cum effectu bona retineat; sine re, cum alius iure civili evincere hereditatem possit; veluti si suus heres in testamento praeteritus sit, licet scriptis heredibus secundum tabulas bonorum possessio deferatur, erit tamen ea bonorum possessio sine re, quoniam suus heres evincere hereditatem iure legitimo potest.

possessio ab intestato, the praetor extended the list of those whom the Twelve Tables called to an intestate inheritance (see note on *primum*, p. 285) to children (*liberi*), statutory heirs (*legitimi*), cognates (*cognati*), husband and wife (*vir et uxor*), each order succeeding upon failure of the preceding.

8. **cum re aut sine re**: if the civil heir should not apply to the praetor for the possession or should not assert his title, any one of remoter claim might make application for the inheritance. If, however, the praetor had made a provisional award to a *bonorum possessor*, he could be evicted by the civil heir, and the possession being only provisional was said to be *sine re*, *i.e.* in name, but not in fact. Those from whom the inheritance could not be called away were said to have *bonorum possessio cum re* (in name and fact).

APPENDIX

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